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No. _____

In The

Supreme Court of the United States

October Term, 1985

GEORGIA J. LEWIS,

Petitioner,

vs.

The Hon. R. MAX BLACKBURN, Clerk of Superior Court for Mecklenburg County, and The Hon. FRANK W. SNEPP, JR., Senior Regular Resident Superior Court Judge, Mecklenburg County, North Carolina.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether It Is A Matter of Public Importance Within the Meaning of the First Amendment that Petitioner, a State Civil Trial Magistrate, Spoke, At the Suggestion of her Supervisor, A State District Court Judge, to State Legislators in An Attempt to Secure Necessary Additional Clerical Help for Herself and Other Civil Trial Magistrates, Thus Protecting Petitioner Against Non-Reappointment at the End of Her Term for Having So Spoken?

2. Whether This Court ought to Re-examine the Constitutional Right to Petition, Recently Considered in McDonald v. Smith, No. 84-476, June 19, 1985, And Hold That The Communications in This Case Are Absolutely Protected By the First Amendment.

3. Whether the Court of Appeals Violated Rule 52(a), Fed.R.Civ.P., by Redetermining the Historical and Motiva-

tional Facts Underlying this Constitutional Controversy without Determining that the District Court's Findings on these Underlying Facts were Clearly Erroneous.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Reports of Opinions	1
Grounds of Jurisdiction	1
Constitutional and Statutory Provisions	2, App. 219
Statement of the Case	2
Statement of Facts	4
Argument I	10
Argument II	22
Argument III	50
Appendix	
Opinions of the United States Court of Appeals for the Fourth Circuit	
- En Banc, April 24, 1985	App. 1
- Panel Majority, May 17, 1984	App. 4
- Panel Dissent, May 17, 1984	App. 42
Opinions and Orders of the United States District Court for the Western District of North Carolina	
- Memorandum of Decision and Order, December 3, 1982	App. 62
- Final Order, December 23, 1982	App. 76
- Order, December 30, 1982	App. 80

- Memorandum of Decision and Final Order, January 13, 1983 App. 83
- Supplemental Findings of Fact, January 24, 1983 App. 131

Judgment of United States Court of Appeals, April 24, 1985 App. 136

Extracts from Transcripts of District Court Proceedings
- November 22, 1982
  - Petitioner, direct App. 138
  - Petitioner, cross App. 156
  - Petitioner's Supervisor App. 163
  - Respondent Clerk, called by Petitioner, direct App. 170
  - Respondent Clerk, cross by his counsel App. 177
- January 10, 1983
  - Respondent Judge, called by Petitioner, direct App. 180
  - Respondent Judge. cross by his counsel App. 218

Constitutional Provisions
- United States Constitution, Amendment I App. 219
- 42 United States Code 1983 App. 219
- North Carolina Constitution, Article IV, Section 10 App. 219
- North Carolina General Statutes
  - 7A-170 App. 220
  - 7A-171 App. 220
  - 7A-175 App. 221
  - 7A-210 App. 221
  - 7A-211 App. 222
  - 7A-292 App. 222

TABLE OF AUTHORITIES

Cases

Ambrosius v. O'Farrell, 119 Ill. App. 265 (1905) 46

Anderson v. City of Bessemer City, ___ U.S. ___, 53 U.S.L.W. 4314 (U.S., 1985) 52

Bradley v. United States, 410 U.S. 605 (1973) 42

Connick v. Myers, 461 U.S. 138 (1983) 10, 11, 13, 16, 17, 23, 24, 50

Curtis v. Loether, 415 U.S. 189 (1974) 27

Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 53 U.S.L.W. 4866 (U.S., 6-25-85) 11

Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 45

Forest v. Hughes, 21 N.C.App. 268 (1974), cert. den., 285 N.C. 589 (1974) 16

Gertz v. Robert Welch, 418 U.S. 323 (1974) 12

Givan v. Western Line Consolid. Sch. Dist., 439 U.S. 410 (1979) . . 20

Harris v. Huntington, 2 Tyler 129 (Vt., 1802) 27

Jacobellis v. Ohio, 378 U.S. 184 (1964) 51, 52

Lake v. King, 1 Wms. Saud. 131, 85 Eng. Rep. 137 (1680) 27

Lewis v. Blackburn, 555 F. Supp. 713 (W.D.N.C. 1983) . . . . . 1, passim

Lewis v. Blackburn, 734 F. 2nd 1000 (C.A. 4, 1984) . . . . . 1, 4, passim

McDonald v. Smith, ___ U.S. ___ (No. 84-476, June 19, 1985) . . 24, 25, 36, 42, 45

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915-16 and n. 50 (1982) . . . . . .

Osborn v. Pennsylvania Delaware Service Station Dealers Assoc., 449 F.Supp. 553 (D.Del. 1980) 45

Pickering v. Board of Education, 391 U.S. 563 (1968) 20

People v. Gottfried, 69 Misc.2d 305, 314 N.Y.S.2d 725 23

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 12

Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 465 (1979) 23

Speizer v. Randall, 357 U.S. 513 (1958) 51

Swint v. Pullman Standard Co., 456 U.S. 273 (1982) 50

Time, Inc. v. Hill, 385 U.S. 374 (1967) 12

Wiemann v. Updegraff, 344 U.S. 183, (1952) 17

Yancy v. Commonwealth, 135 Ky. 207, 122 S.W. 123 (1909) 23

Constitutional Provisions

United States Constitution, Amendment I . . . . . passim

North Carolina Constitution, Article IV, Section 10 3

Statutes

42 United States Code Section 1983 . . . . . App. 219

North Carolina General Statutes Section 7A-170 . . . . . 15, App. 220

North Carolina General Statutes Section 7A-171 . . . . . App. 220

North Carolina General Statutes Section 7A-175 . . . . . 17, App. 221

North Carolina General Statutes Section 7A-210 . . . . . App. 221

North Carolina General Statutes Section 7A-211 . . . . . App. 222

North Carolina General Statutes Section 7A-292 . . . . . 16, App. 222

Rules

Rule 52(a), Fed.R.Civ.P. 19

Historical Materials

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Colonial Laws of Massachusetts (ed. 1672) 37

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2, 3, 4 Debates of the Several State Conventions on the Adoption of the Constitution 39

2 Documentary History of the Constitution of the United States 39

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History of Congress Exhibiting A Classification of the Proceedings of the Senate and the House of Representatives from March 3, 1973 . . . 47

12 Howell's State Trials 31

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4 Parl. Hist. 31

5 Parl. Hist., App. . . . 30, 34, 35, 46

32 Parl. Hist. 26

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Vol. 297, North Carolina Reports . . . 58

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REPORTS OF OPINIONS

The District Court opinion of January 13, 1983, supplemented January 24, 1983, is reported as Lewis v. Blackburn, 555 F.Supp. 713 (W.D.N.C. 1983), and also appears at App. 83, 131. Earlier rulings of the District Court appear as follows:

Memorandum of Decision and Order, December 3, 1982	App. 62
Final Order, December 23, 1982	App. 76
Order, December 30, 1982	App. 80

The En Banc Circuit Court decision which is sought to be reviewed in this Court appears at App. 1. It is not yet reported.

The Circuit Court panel opinion is reported as Lewis v. Blackburn, 734 F.2d 1000 (C.A. 4, 1984) and also appears at App. 4. The panel dissent appears at App. 42.

GROUNDS OF JURISDICTION

The Judgment sought to be reviewed was rendered by the En Banc United States

Court of Appeals for the Fourth Circuit on April 24, 1985. There was no Petition for Rehearing and no Order Extending Time has been granted. It is believed that certiorari jurisdiction is conferred on this Court by 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Appendix.

STATEMENT OF THE CASE

This is a civil action which was filed in the United States District Court for the Western District of North Carolina, Charlotte Division, on October 7, 1982. The original Defendant was Respondent R. Max Blackburn, Clerk of Superior Court for Mecklenburg County, North Carolina. Jurisdiction was founded on 28 U.S.C. 1343. Recovery was sought under 42 U.S.C. 1983. Petitioner alleged that Respondent Blackburn had infringed her rights under the First Amendment by failing

to renominate her for a term as Magistrate commencing January 1, 1983. Petitioner sought declaratory and injunctive relief to require renomination. On December 3, 1982, the Court, Hon. James B. McMillan Presiding, found Plaintiff to be entitled to relief and directed the parties to confer as to an appropriate form of relief. App. 62, 74. On December 23, 1982, the Court directed Respondent Blackburn to recommend Petitioner for renomination. App. 76, 77. On December 29, 1982, Petitioner moved for leave to file a First Supplemental Complaint, which alleged that Respondent Blackburn had renominated her but Respondent Snepp had refused to reappoint her, and sought declaratory and injunctive relief to require reappointment. The Court allowed the filing of the Supplemental Complaint and by Preliminary Injunction entered December 30, 1984, prevented appointment of any person to the vacancy at

issue. App. 80. At final trial the Court ruled that Petitioner's First Amendment rights had been violated by Respondents and ordered her reappointment. 555 F. Supp. 713, 724. App. 83, 130. Respondents appealed and obtained a stay from the Fourth Circuit Court of Appeals, per Ervin, J. On appeal Chief Judge Winter and Judge Aldrich of the First Circuit (sitting by designation) voted to affirm. Lewis v. Blackburn, 734 F.2d 1000, App. 4. Judge Ervin dissented. 734 F.2d at 1008, App. 42. Rehearing En Banc was allowed and the En Banc Court reversed the District Court judgment. App. 1 (not yet reported).

STATEMENT OF FACTS

In August, 1978, Plaintiff was appointed to fill the remainder of an unexpired term as a Magistrate of the General Court of Justice of Mecklenburg County, North Carolina. She was reappointed at the end of 1978 and 1980 to regular biennial

terms. Magistrates are nominated by the Clerk of Superior Court, appointed by the Senior Regular Resident Superior Court Judge, and, by custom, supervised by the Chief District Judge. Mecklenburg County has approximately 20 Magistrates. Petitioner initially was a warrant-issuing Magistrate. In 1981 she became a Civil Trial Magistrate through a competitive selection process administered by a Panel of District Court Judges.

In the summer of 1982 Respondent Blackburn directed Petitioner and the other two civil trial magistrates to microfilm certain pleadings in cases before them, in addition to the judgments they were already microfilming. At that time Petitioner had an extra heavy case load because one of the other civil trial magistrates had been on vacation the prior week and the other was on duty training warrant-issuing magistrates. Petitioner had several hundred

cases on her desk. The prior week she had worked each day at least until 6:00 p.m. and sometimes until 8:00 p.m. She was, as usual, doing her own typing. 555 F. Supp. at 716; App. 91; See, App. 143-44. The additional microfilming would have added a half hour to an hour to her average working day. App. 145. To avoid additional overtime, Plaintiff spoke to her supervisor, the Chief District Judge. She told him about the microfilming directive and asked if anything could be done to help with their workload. App. 147. The Chief District Judge considered the matter and later suggested to Petitioner that she confer with two state legislators who lived in the County, one of whom was the Chairman of the Courts Commission, to determine if additional clerical help could be obtained. 555 F. Supp. at 716, App. 92, 148, 164-65. Petitioner then contacted these legislators. She also spoke, at her Supervisor's

suggestion, with Respondent Snepp when he chanced to walk by her courtroom about 6:00 one evening. 555 F. Supp. 716, App. 92. She showed him all the cases piled on her desk and asked if any help could be obtained. App. 149-50.

Two working weeks after her initial conversation with the Chief District Judge he told Petitioner that in his opinion the Respondent Clerk had the authority to order her to do the additional microfilming. She then promptly complied with the Clerk's directive. During the two week hiatus she had not complied because she "did not feel that she should stop doing her judicial work and start doing microfilming for the Clerk." 734 F.2d at 1006, App. 27-28; 555 F. Supp. at 716, App. 91.

The District Court found as a fact that:

> "[T]he reason [Respondent Blackburn] did not recommend [Petitioner] for renomination was that

> she protested the additional clerical duties and because she talked about the problem with other persons concerned in the administration of the Courts including a District Judge [her supervisor], a Superior Court Judge [Respondent Snepp], a County Commissioner, members of the legislative delegation, and a person from the Administrative Office of the Courts [who was with Respondent Snepp when he chanced to pass Petitioner's Court]." 555 F. Supp. at 716. App. 93-94.

The Court specifically disbelieved the other reasons advanced by the Respondent Clerk. 555 F. Supp. at 717, App. 95-96. The Court of Appeals Panel held that the above-quoted finding of fact was not clearly erroneous. 734 F.2d at 1004 App. 17. The panel dissent agreed. 734 F. 2d at 1008-09, App. 42. The En Banc Court did not address the issue. The District Court also concluded that the Respondent Clerk lacked authority to have ordered Petitioner to do the additional microfilming, and the Court of Appeals panel majority agreed.

555 F. Supp. 716 App. 90-91; 734 F.2d at 1005, App. 25-26. The en banc Court did not address the issue.

After the Respondent Clerk recommended Petitioner for renomination in accordance with the Order of December 23, 1982, App. 76, Respondent Judge Snepp refused to re-appoint her. He wrote to the Respondent Clerk and stated:

> "...I am deeply and sincerely opposed to unwarranted intrusion upon the legitimate responsibilities and duties of a State Judge by Federal Courts...I regard...the dictation as to whom you could recommend...as such an intrusion." 555 F.Supp. 718, App. 102.

The District Court found as fact that Respondent Snepp refused to reappoint Plaintiff for having resorted to Federal Court. 555 F. Supp. at 725, App. 135. The District Court also found as a fact that Respondent Snepp refused to reappoint Petitioner because of her having spoken to her Supervisor, to him, and to the legislators and others, about the microfilming direc-

tive. 555 F.Supp. at 718, 724-25; App. 103-04, 134-35. The Court of Appeals panel majority held these findings were not clearly erroneous. 734 F.2d at 1004, App. 17.

ARGUMENT

I. It is a Matter of Public Importance Within the Meaning of the First Amendment that Petitioner, A State Civil Trial Magistrate, Spoke, At the Suggestion of her Supervisor, A State District Court Judge, to State Legislators in An Attempt to Secure Necessary Additional Clerical Help for Herself and Other Civil Trail Magistrates, Thus Protecting Petitioner Against Non-Reappointment at the End of Her Term for Having So Spoken.

The En Banc Circuit Court held that Petitioner did not address a "matter of public concern" within the meaning of Connick v. Myers, 461 U.S. 138, 147

(1983). That case teaches that the question of whether speech addresses a matter of public concern is to be determined from the "content, form and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48.

There is an unresolved question within this Court as to the proper analytic framework to be used in deciding whether a subject is of public concern. Compare, Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 53 U. S. L. W. 4866, 4869-70 (U.S., June 25, 1985) (plurality opinion of Powell, J.) with id., at 4873-77 (dissenting opinion of Brennan, J.). The present case presents a factual situation lying between this Court's prior determinations on this issue, and thus an opportunity to settle the analytic framework to be applied. Compare Connick (public employee, matter not circulated beyond the office) and Dun and Bradstreet, at 4869 ("speech

solely in the individual interest of the speaker and its specific business audience") with Gertz v. Robert Welch, 418 U.S. 323 (1974) (magazine article accusing lawyer of being a communist); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (radio report of arrest of seller of alleged pornography); Time, Inc. v. Hill, 385 U.S. 374 (1967) (publication of report of play about earlier publicized taking of hostages). The present case, involving a judicial position created by the North Carolina Constitution, and speech directly related to the efficient functioning of that office, presents a factual situation different from any of these cases and an appropriate vehicle for resolving the proper approach to be taken to "public matter" cases.

Examination of the "content, form and context" of Petitioner's remarks reveals that the Circuit Court reached a conclusion

seriously inconsistent with Connick and other controlling precedent in this Court.

(a) Content. These are Petitioner's remarks. First, she told her supervisor:

> "...We had gotten a memo...directing us to do the microfilming of the entire case and that I was bogged down at that particular point, that I just didn't have the time, and I wondered if there was anything that could be done to help us, relieve us of this." App. 147.

Next, she talked to the Legislators concerning:

> "...get[ting] another clerical clerk in to help us [the three civil trial magistrates] with the microfilming." App. 148 (emphasis added).

Then she spoke with Respondent Snepp.

> "I told him basically the same thing that I told Judge Saunders [her supervisor], that we had received the [microfilming] memo. I showed him the memo, and I showed him the cases as they were piled up on my desk and in my room, and I asked him if anything could be done to help relieve us of this situation." App. 149-50. (Emphasis added).

The content of Petitioner's remarks to her Supervisor and to the Legislators and

Respondent Judge Snepp was a request for clerical help from an overworked Judge. It was Petitioner's remarks to the Legislators and to Respondent Judge Snepp that caused her dismissal. The subject matter of her remarks to the Legislators and to Respondent Judge Snepp was public in nature. The dispatch of Court business is a public subject. The fact that her supervisor, the Chief District Judge, an elected official, suggested that she speak to Legislators about her problem further indicates that it was of a public nature. There is no indication in the Record that Petitioner would have spoken to either the Legislators or Respondent Judge Snepp, had her Supervisor not suggested that she do so. She complied with the microfilming directive after her Supervisor told her that in his opinion it was within the Respondent Clerk's power. There is no record evidence that Petitioner spoke to anyone about the matter after she

began to comply with the microfilming directive. Respondent Judge Snepp agreed that the Court needed more clerical personnel, particularly in view of a freeze on hiring and on filling vacancies. 555 F. Supp. 719, App. 107; App. 218. He considered the content of her request to be public in nature. App. 205-06, 214-15. Her Supervisor thought the matter merited Legislative attention. 734 F.2d at 1005, App. 22-23.

(b) Form. Except for Petitioner's delay of two weeks in complying with Respondent Blackburn's unauthorized directive, her activities were pure speech. There is no suggestion in the record that there was a confrontational aspect to any of her conversations, or that she was in any way argumentative or hostile.

(c) Context. This case is unique in that it is a Judicial Officer who is being penalized for speaking out. N.C.Gen.Stat.

7A-170, App. 220 Petitioner is not the employee of either Respondent. Petitioner has judicial immunity under North Carolina law. Forest v. Hughes, 21 N.C. App. 268 (1974), cert. den. 285 N.C. 589 (1974). Petitioner has the power to punish for criminal contempt. N.C.G.S. 7A-292(2), App. 223. The tripartite distribution of nominative, appointive and supervisory functions appears to be designed to prevent a Magistrate from being the kept officer of any other authority. A North Carolina Magistrate is not an "employee" in the sense that Respondent in Connick v. Myers was an employee. Petitioner has a fixed term of office, N.C. Const., Art. IV, Sec. 10, App. 219 and a tenure interest in her reappointment. 555 F. Supp. at 721, App. 115. The magistrate is not a confidential or policy-making associate of either Respondent. 555 F. Supp. at 717, App. 98. She does not

work in Respondent Blackburn's office, but in her own courtroom. There is no record evidence of any regular contact between her courtroom and the Respondent Clerk's office, though doubtless some exists. See, N.C.G.S. 7 A-175, App. 221. In assaying whether a matter is of public concern, it is pertinent that it emanated from a Judicial Officer. The legally sanctioned status of the office of Magistrate makes matters involving Petitioner's job more likely affected with a public interest than matters involving a direct subordinate of an employer. There is a vital public interest in the independence of Judges. Their requests for additional staff are matters of public importance. Cf., Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (public interest in academic freedom).

In distinction to Respondent in Connick v. Myers, who "did not seek to

inform the public that the District Attorney's office was not discharging its governmental responsibilities," Petitioner took her problem to persons with the legal power to remedy it. Respondent Judge Snepp agreed that she did so in such a manner as to avoid bringing disrepute on the judicial system. 555 F.Supp. at 719, App. 106. This case presents a Magistrate who, at the suggestion of her Supervisor, a Judge, spoke to Legislators and a Judge, in a respectful manner which brought no disrepute upon the Courts, about a matter affecting the efficiency of all the civil trial Magistrates.

The theory of the En Banc Court is that Petitioner was motivated by "personal effrontery over being asked to do more work" and that therefore her concerns did not implicate public matters. 734 F. 2d at

1010, App. 48-49.[1] The Court held that Petitioner's motivation, "her immediate self-interest," 734 F.2d 1012, App.61, was centrally important. It made no mention of the fact that Petitioner's Supervisor told her to speak out, nor did it analyze the substance of her remarks. It took no note of Petitioner's testimony that her motive in resisting the additional micro-filming was the effect that it would have on all three civil trial Magistrates, not just on Petitioner. App. 147, 148, quoted supra, p. 13.

Self-interest is no magic catch-phrase

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[1] The en banc Court did not adopt the Panel dissent, but reversed "[f]or the reasons adequately set forth in [the] dissent." App. 2. Reference here to the Circuit Court is to the panel dissent.

Argument III, infra deals with whether the Circuit Court violated Rule 52(a), Fed.R.Civ.P., in deriving the factual basis on which the "personal effrontery" theory is based. The Argument here pretermits that question and addresses the legality of the theory that motivation is centrally important.

that puts a matter beyond claim of public importance. In Pickering v. Board of Education, 391 U.S. 563 (1968) a direct employee stood to personally profit from the political position he advocated. If his position (which was stated much more abrasively than is the case with Petitioner here, see Appendix, 391 U.S. at 575) had been adopted, relatively more school funds would have been allocated to educational programs in which he was involved. Petitioner in Givhan v. Western Line Consolid. Sch. Dist., 439 U.S. 410 (1979) was protesting alleged racially discriminatory employment policies which had an impact upon her own job. 439 U.S. at 413. The Court's opinion nowhere mentions whether she might have been attempting to advance her own self-interest, but rather states:

> "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accord-

> ingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."

Judges are, as a class, the members of the community most likely to have informed opinions about whether Courts are understaffed. A substantial number of the legitimate complaints about the operation of government will become known initially to persons who work in government. The Circuit Court demands excessive altruism of these public servants. The Circuit Court has focused on motivation as the exclusive category for determination of "public concern," to the exclusion of content, form and context. This is error. Matters of public concern include matters of immediate personal concern.

II. This Court Ought to Re-Examine the Constitutional Right to Petition, Recently Considered in McDonald v. Smith, No. 84-476, June 19, 1985, and Hold That the Communications in This Case Are Absolutely Protected by the First Amendment.

This District Court found as a fact that it was the speaking to the Legislators that caused both non-renomination and non-reappointment. 555 F.Supp. at 716, 718, 724-25; App. 93-94, 103-04, 134-35. The District Court also found as a fact that Respondent Judge Snepp refused to reappoint Petitioner because she sued him in federal court. These communications were petitions to the government in the classical sense of the term. It is well established that a "public employee...can petition openly, and he is protected by the First Amendment from retaliation for

doing so." Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979). Textually, it appears that the failure to reappoint Petitioner to her judgeship infringed the right to petition.

In Connick v. Myers, 461 U.S. 138 (1983), neither in this Court nor in the lower court, 507 F.Supp. 752 (E.D.La., 1981) was there any consideration of the right to petition, although arguably respondent's circulation of her questionnaire fell within the zone protected by the right to petition. See Yancey v. Commonwealth, 135 Ky. 207, 122 S.W. 123 (1909); People v. Gottfried, 69 Misc.2d 305, 314 N.Y.S.2d 725. By contrast, in the present case the right to petition was raised in the Complaint, passed on by the District Court, 555 F.Supp. at 721, 723-24, App.114, 129, and argued to and considered by the Court of Appeals, 734 F.2d

1007, App. 35-36 (panel majority); 734 F.2d 1011-12, App. 58-61 (En Banc Court).

In this Court's decision last term of McDonald v. Smith, _____ U.S. _____ (No. 84-476, June 19, 1985), both the majority and concurring opinions assume, but do not expressly hold, that the First Amendment right of petition extends no further than the cognate expressive rights of free speech and press. Consistent with that view of the First Amendment, petitioner's rights in this case would be dependent upon whether her communications were within the constitutionally protected sphere outlined by Connick v. Myers, the point which is discussed in Argument I of this petition. Here, however, petitioner urges that whatever her rights may be under the principle of freedom of speech, her communications were independently protected by the First Amendment petition clause.

In McDonald v. Smith, the Court appeared to treat the right to petition as surplusage in the First Amendment. A thorough analysis of the history, textual development and draftsmen's intent of the right to petition and the purposes and interests served by that right reveals that the right to petition should probably be regarded as far more nearly an absolute right than the freedoms of speech and press, subject to fewer limitations than have grown up around these other expressive rights. As properly defined, the right to petition clearly protects the communications to government officers that are the basis of the instant case.

(1) History. Only two historical references are provided in the majority and concurring opinions in McDonald v. Smith. One is the mischaracterization in a footnote in the majority opinion, as an "attack" on the right to petition, of

Parliament's enactment in "the 1790's" of a statute making illegal public meetings of more than 50 persons for the purpose of petitioning without a magistrate present. Slip op. maj., p. 5, n. 5. The statute in question controlled the assembly incidental to petitioning, not the core petitioning activity itself. As Pitt, whose government proposed the law, so eloquently stated: "No one would venture to deny the right of the people to express their opinions on political men and measures and to discuss and assert their right of petitioning all branches of the legislature ...a most valuable privilege, of which nothing should deprive them." 32 Parl. Hist. 274-75 (Nov. 10, 1795). Moreover, the statute, the Seditious Public Meetings Act of 1795, was enacted four years after 1791, the year in which the common and constitutional law of England became fixed for the purposes of the United States Bill

of Rights. Curtis v. Loether, 415 U.S. 189, 193 (1974). The other historical reference, which appears in both the majority and concurring opinions, is a claim that American libel cases decided prior to the adoption of the First Amendment reveal conflicting positions on the privilege afforded to petitioners. Slip op. maj., p. 3, slip op. concur., p. 4. In fact, there appear to have been no cases of this description. It must be assumed, therefore, that the English common law of absolute immunity, as expressed in Lake v. King, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (1680), was the law in America. The first reported American case dealing with this issue is Harris v. Huntington, 2 Tyler 129 (Vt., 1802), which upheld absolute immunity for petitioners from defamation claims in an opinion that relied upon the English common law and the history of the right to petition.

The right to petition derives from English constitutional sources that long antedate the conception of a general freedom of expression. The earliest petition recorded in our constitutional history is the petition in 1013 of the English leaders to Aethelred the Unready, who had fled to France during an invasion of the Danes, listing their grievances and summoning him to appear in council. He responded by promising not to retaliate against them for setting forth their complaints and for other actions they had taken, and promising that he would remedy their grievances. Marsh, Documents of Liberty 13-14 (1971). Magna Carta of 1215, the fundamental sources of Anglo-American liberties, was granted in response to a petition, and specifically recognized petitioning as a right. "[I]f we, our justiciar, or our bailiffs or any of our officers, shall in anything be at fault toward anyone, or

shall have broken any one of the articles of the peace or of this security, and the offenses be notified to four barons of the five-and-twenty, the said barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have the transgression redressed without delay." McKechnie, Magna Carta 467 (2d ed. 1914) (emphasis added). Under Edward III it became established practice at the opening of every session of Parliament for the Chancellor to declare the King's willingness to consider petitions of the people. D.H. Williams, A History of England, 174-78 (1967). James I issued a Proclamation in 1622 that it is "the right of his subjects to make their immediate addresses to him by petition." Proclamation 10 July, 19 Jac., 5 Parl. Hist. App.p. ccxiv. Charles I in 1644 invited any subjects with grievances to freely address them-

selves to him by petition, with the promise that their complaints would be heard. 5 Parl. Hist. App. p. ccxiv.

In 1669, the Commons resolved, "[I]t is an inherent right of every commoner of England to prepare and present Petition to the House of Commons in case of grievance ..." 4 Parl. Deb. (1st ser. Cobbett) 432-33 (1669). In response to Shaftesbury's vast campaign to collect signatures to petitions favoring an assembly of Parliament, the King issued a Proclamation prohibiting the promotion of petitions for "specious ends." C.S. Emden, The People and the Constitution, 75 (2d ed. 1959). Parliament rejoined in 1680 with a resolution that "it is and ever hath been the undoubted right of the subjects of England to petition the King for the calling and sitting of Parliament and the redressing of grievances" and a further resolution "that to traduce such petitioning is a

violation of duty, and to represent it to his majesty as tumultuous and seditious is to betray the liberty of the subject, and contribute to the design of subverting the ancient legal constitution of his kingdom, and introducing arbitrary power." 4 Parl. Hist. 1174; C.S. Emden, supra, p. 30. Parliament then proceeded against these persons who had advised or promoted the royal proclamation "in abhorrence of petitioning."

Seven bishops drew up and presented an humble petition to James II in 1688, expressing the view that a declaration he had commanded to be read at divine services was illegal. They were prosecuted for seditious libel. The petition was held seditious as a matter of law, but the jury nullified the law and acquitted the bishops. 3 Celebrated Trials and Remarkable Cases of Criminal Jurisprudence, 144, 157, 161, 164; 12 Howell's State Trials

183 (1688). The Case of the Seven Bishops led directly to the Glorious Revolution of 1688 and to the adoption of the Bill of Rights, where the right to petition was codified a century before the American Revolution: "[I]t is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning is illegal." M.A. Thomson, Constitutional History of England 1642-1801, 171-74 (1938). The statute's recitation of purpose makes it clear that the law declared in the Case of the Seven Bishops was rejected, stating that James II had endeavored to "subvert and extirpate" the "Laws and Liberties of the Kingdom" by "committing and prosecuting diverse worthy prelates for humbly petitioning to be excused from concurring to the said assumed Power." 1 Will. and Mar. Stat. 2, c.2.

Members of the grand jury of Kent were held in contempt of Parliament in 1701 for a "scandalous" and "seditious" petition in which they had asked that the King be granted money needed for prosecution of war with France. There was an upwelling of public sentiment, sparked by pamphlets authored by Daniel Defoe and others, which forced Parliament to grant the requested money bills and speedily adjourn, the adjournment working the release of the petitioner before the legality of their confinement could be tested by habeas corpus. Defoe, "History of the Kentish Petition," and "Legion's Memorial" in An English Garner: Later Stuart Tracts, 159, 179 (G.A. Aitken ed. 1903). Also reprinted in 5 Parl. Hist. App. No. XVI and pp. 1252-55. Somers, Jura Populi Anglicani or the Subjects' Right of Petitioning Set Forth (1701), reprinted in 5 Parl. Hist. App. No.

XVIII. See also 5 Parl. Hist. 1251, 1256-57. It is widely held that after the events of 1701 and this sequel in 1702, the right to petition in England had become absolute, and that from then to the time of the adoption of the United States' Bill of Rights, no English subject was ever prosecuted, punished or proceeded against in any manner for the act of petitioning or the content of a petition. C.S. Emden, The People and the Constitution, 77 (2d ed. 1959). See 5 Parl. Hist. 1337-40. Another view is to the effect that petitioning did not become an absolute right in England until the Middlesex election controversy of 1769. Fraser, Public Petitioning and Parliament Before 1832, 46 History 195, 201 (1961). Even so, it is not disputed that petitioning in England had become an unqualified freedom well before 1791.

Likewise, in the American colonies petitioning had become essentially an absolute right by the Eighteenth Century. For example, a painstaking study of petitioning in Colonial Virginia of this period discloses that petitioners were not subject to punishment for their activities, and the efforts of three royal govenors - Beckley, Effingham and Spotswood - to interfere with petitioning were successfully thwarted by the colonists. R. C. Bailey, Popular Influence Upon Public Policy: Petitioning in Eighteenth Century Virginia, 30, 38-39 (1979).

In sharp contrast to the right to petition, the freedoms of speech and of the press were curtailed through a variety of devices in both England and America before the Revolution. See generally, F. Siebert, Freedom of the Press in England 1476-1776, (1952), and L. Levy, Freedom of

Speech and Press in Early American History: Legacy of Suppression (1963). Political expression unpopular with the govenment was prosecuted as seditious libel. If juries failed to convict, the House of Commons and colonial assemblies cited and imprisoned authors and public speakers. F. Siebert, supra, at 371-72; L. Levy, supra, at 15-16, 20-23. Various acts regulating printing and imposing taxes severely restricted the press. F. Siebert, supra.

(2) Textual Development. In McDonald v. Smith, no consideration is given to the development of the text of the First Amendment petition clause. Its language appears to be drawn from the petition clauses in Magna Carta and the British Bill of Rights, which supports the interpretation that the English late Eighteenth Century absolutist conception of the right to petition was intended to

be adopted by the framers of the First Amendment.

There are also American charter, declaration, and state constitutional sources which appear to be related to the language of the petition clause. The earliest of these sources is the Body of Liberties adopted by Massachusetts Bay Colony in 1642, which provided:

> [E]very man whether Inhabitant or Foreigner, free or not free, shall have liberty to come to any publick Court, Council or Town Meeting, and either by speech or writing, to move any lawful, reasonable or material Question, or to present any necessary Motion, Complaint, Petition, Bill or Information whereof that Meeting hath proper cognizance, for it be done in convenient time, due Order and respective Manner. Colonial Laws of Massachusetts, Reprinted from the Edition of 1672, 90 (1887).

Declarations of rights by state conventions during the revoluntionary era including Pennsylvania (1776),2/ Delaware

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2/ 5 Thorpe, The Federal and State Constitutions, Colonial Charters and their Organic Laws, 3081-92 (1909).

(1776),3/ North Carolina (1776),4/ Vermont (1777),5/ Massachusetts (1780),6/ and New Hampshire (1783),7/ expressly set out the right to petition. Instead of the numerous limitations (lawfulness, reasonableness, materiality, necessity, within the body's cognizance, convenient time, due order, "respective" manner) placed on petitioning by the Massachusetts Body of Liberties of the last century, these declarations qualified the right to petition only by specifying that it must be

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3/ 1 Laws of the State of Delaware 1700-1797, app. 79-81 (1797).

4/ 2 Poore, Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States 1409-11.

5/ 6 Thorpe, supra, at 3737-41.

6/ Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay 1779-1780, 191-97.

7/ 4 Thorpe, supra, at 2453-57.

exercised in an "orderly and peaceable manner;" except for North Carolina, Pennsylvania, and Vermont, which placed no limitations whatever on the right. Four of the American republics, Maryland,8/ New York,9/ North Carolina,10/ and Virginia,11/ specified in their ratifying conventions for the proposed federal constitution that the right of petition should be guaranteed; of these, only Maryland included the requirement of "peaceable and orderly manner" or any other limitation. To the extent the

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8/ 2 The Debates in the Several State Conventions on the Adoption of the Constitution 547-56.

9/ 2 Documentary History of the Constitution of the United States 190-203.

10/ 4 The Debates in the Several State Conventions on the Adoption of the Constitution 55-251.

11/ 3 The Debates in the Several State Conventions on the Adoption of the Constitution 21-663.

First Amendment right of petition was drawn from these state sources, and in light of the elimination in these sources of limitations on the right to petition, except for peaceableness and orderliness, it would be reasonable to assume that the framers did not intend to allow petitioner to suffer ill consequences for the contents of their communications.

(3) Draftmen's Intent. The provision of the First amendment guaranteeing the right to petition was drafted by Madison and extensively debated in the House of Representatives and then amended in the Senate. The original proposed text of the First Amendment was: "The freedom of speech and of the press, and the right of the people peaceably to assemble and con sult for their common good, and to apply to the Government for redress of grie vances, shall not be infringed." 1 Annals of Congress, 685-92; 2 B. Schwartz,

The Bill of Rights: A Documentary History, 1089-91 (1971). Congressman Sedgwich moved to strike out "assemble and" because that was encompassed within the concept of free speech in his view. Opponents of the motion stated that all the enumerated rights were separate rights inherent in the people, and should be specifically protected against infringement by the government. The motion to strike was defeated. 2 B. Schwartz, supra, no. 44, at 1091-1105. The defeat of this motion, perhaps to have been followed if successful by a motion to strike petitioning, should be regarded as evidence of Congressional intent that petitioning was deemed to be a unique right, a right entirely distinct from speech and press. The Senate rewrote the petition language to essentially its present form; after insignificant amendments in both House and Senate, it emerged in its final language.

History of Congress Exhibiting a Classification of the Proceedings of the Senate and the House of Representatives from March 4, 1789, to March 3, 1793, 155-159, 160-68, 169-70, 171-73. Thus, the only amendment of the text of the First Amendment that significantly affects the petition clause was to substitute the word "petition" for the words "apply to." Although no statement of intent accompanied this change of language, it could have had the purpose, and should be held to have the effect, of encrusting the substituted term with its well established common law and historical meaning as an absolute right. Bradley v. United States, 410 U.S. 605 (1973).

The only mention the majority and concurring Justices in McDonald v. Smith make of the intent of the draftsmen of the First Amendment is a reference in both opinions to Madison's speech in the First

Congress, "[T]he people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will." 1 Annals of Congress, 738 (Aug. 15, 1789). The authors of the opinions cited this statement as an indication that Madison believed petitioning was encompassed within speech. Slip op. maj., p. 3; slip op. concur., p. 5. When Madison's remark is placed in context, however, it is plain that this was not his intended meaning. Madison's statement was made in the course of a debate on whether representatives should have to submit to the instructions of the electorate. Although he concurred with the majority and voted to reject the proposed right of instruction, Madison and everyone else agreed that popular opinion ought to be received and considered, and the right to

petition for redress of grievances must be respected. 2 B. Schwartz, supra, at 1093-94. The reliance placed in the debate on the alternative of petitioning as a means of making known the public will, must be accepted as indicating that the right of petition was regarded as a unique right.

(4) Purposes and interests served. The only reference in McDonald v. Smith to the interests served by petitioning is a generalized comment in the concurring opinion that the "self-govenance" function is as fully served by speech and the press as it is by petition. Slip op. concur., p. 4. It is doubtless true that any function of petitioning could be fulfilled by exercise of the speech and press rights, if the latter were not subject to limitation. Injury is done to the vital interests served by petitioning, however, when limitations on expressive rights

generally are automatically engrafted on the right to petition. For the public good, there should be as little restriction as possible on petitioning, so that the following vital interests can be fulfilled:

(a) Petitioning is the means by which peoples' problems that need government actions are brought to the attention of the government. Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127, 137-38 (1961).

(b) Petitioning is a principal source of the governments' information upon popular attitudes about the way it has conducted public business. Osborn v. Pennsylvania Delaware Service Station Dealers Assoc., 499 F.Supp. 553 (D.Del. 1980).

(c) Incompetence, corruption, waste and other government misconduct are often disclosed by petitions and consequently

remedied. Ambrosius v. O'Farrell, 119 Ill.App. 265 (1905).

(d) In a popular sovereignty petitions are a principal measure of the degree of public approval enjoyed by the incumbent government and its prospects for being kept in office.

(e) The right of petitioning is commonly understood to be of such great value that in English constitutional history, disregard of this right provoked popular uprisings, e.g., The Case of the Seven Bishops and the Kentish petitioners. Efforts to place "time, place and manner" restraints upon these petitioners were unsuccessful. The statute 13 Car. II, Stat. I, c. 5, placing signatory and presentational numerical limits on petitioning was never successfully enforced. See 5 Parl. Hist. 400 (Aug. 14, 1689).

(f) A number of fundamental constitutional reforms were preceded by extensive petitioning activity. The most important of these was the development of popular sovereignty, first by estabishing the legislative supremacy of Parliament in the course of the English Civil War and ensuing events, 1 J.W. Allen, English Political Thought 1603-1660, 346-47 (1939); C.S. Emden, The People and the Constitution, 74 (2d ed. 1959); Coates, Some Observations on the Grand Remonstrance, 4 J. Mod. Hist. 1, 2-5 (1932), and second by gaining universal manhood suffrage through electoral reform. J. Harvey and L. Bather, The British Constitution 54 (2d ed. 1969), C.S. Emden, supra, at 77-78. Also the abolition of slavery, both in the British Empire, C.S. Emden, supra, at 77-78, and the United States, H. Von Holst, The Constitutional and Political History of

the United States, 284 (1888); D. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations, 81-96 (1971) (University Microfilms, unpublished thesis), was the subject of massive petition campaigns.

(g) The availability of petitioning as a popular right allows public feelings to be expressed in a peaceful, orderly way and may be a foil to revolution. Certainly this is indicated by a comparison of the events in England and on the Continent in the revolutionary years of 1831 and 1848. J. Harvey and L. Bather, supra, at 54; L. S. Emden, supra, at 77-78.

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It is incumbent on this Court to re-examine the right to petition in light of its history, textual development, draftsmen's intent and interests and purposes served. The Court must reject the

assumption made in McDonald v. Smith that restrictions applicable to speech and the press automatically apply to petitioning, and must recognize that the right to petition is a nearly absolute right. The Court of Appeals and Respondents have not demonstrated any govenmental interest sufficiently weighty to justify the suppression of the important petitionary right at stake here.

III. The Court of Appeals Violated Rule 52(a), Fed.R.Civ.P., by Redetermining the Historical and Motivational Facts Underlying this Constitutional Controversy Without Determining that the District Court's Findings on these Underlying Facts Were Clearly Erroneous.

The ultimate question of whether the First Amendment has been infringed is a question of law. Connick v. Myers, supra, 461 U.S. 138, nn.7, 10. It is, however, the "protected status" of speech that is the question of law. Id. (Emphasis supplied). What words were in fact spoken, and their motivations, are not questions of constitutional law and are subject to the "clearly erroneous" requirement of Rule 52. Cf., Swint v. Pullman Standard Co., 456 U.S. 273 (1982) (The ultimate question of "discrimination" under Title VII is a question of fact).

This Court and Courts of Appeal make "an independent constitutional judgment on the facts of the case" in a First Amendment case. Jacobellis v. Ohio, 378 U.S. 184, 190 (1964); but this does not permit the redetermination of those facts, as the Circuit Court did here. Reviewing Courts properly look afresh at the circumstances in which words were spoken to determine whether the Constitution has been violated. NAACP v. Claiborne Hardware Co., 458 U.S. 886, at n.50 (1982); but the First Amendment does not trump Rule 52(a). See, Speiser v. Randall, 357 U.S. 513, 525 (1958) (Court may "review" evidence).

In the present case the Circuit Court went far beyond any hard look at the underlying historical and motivational facts. It found certain historical and motivational facts which are in opposition to the facts found by the District Court, and it found other facts without any support in

the record. This case thus presents a serious, unresolved question of the extent to which in constitutional cases appellate courts may enquire into the facts. The potency of Rule 52(a) has been recently reaffirmed by this Court. Anderson v. City of Bessemer City, ___ U.S. ___, 53 U.S.L.W. 4314 (U.S., 1985). The present case poses the question of where the dividing line is to be drawn between the rule of Jacobellis v. Ohio, supra, and Anderson v. City of Bessemer City. In Anderson this Court held that even District Court findings of fact based on documentary evidence - where demeanor is not involved - are entitled to the full measure of Rule 52(a) protection. That is a powerful policy holding in favor of the power of District Judges to determine all historical, motivational, ultimate, documentary, and any other kinds of fact. The Court of Appeals in this case has seriously eroded

that primary fact-finding function of the District Court.

The District Court found as a fact that:

> Petitioner "did not feel that she should stop doing her judicial work and start doing additional microfilming for the Clerk." 555 F. Supp. at 716. App. 91. (Emphasis supplied).

This ultimate finding of Petitioner's motive for delaying the additional microfilming for two weeks was based on the preceding findings of historical fact:

> "At that time [Petitioner] had an extra heavy caseload because one of the [civil trial] magistrates was out of service; [Petitioner] had several hundred cases on her desk; [and Petitioner] was, as usual, doing her own typing[.]" 555 F.Supp. at 716, App. 91.

The Circuit Court, however, concluded that "[t]he record is unequivocal that the motivation for [Petitioner's] complaint was personal effrontery over being asked to do more work." 734 F.2d at 1010, App. 48-49. The Circuit Court further concluded:

> "A careful reading of the record fails to disclose any expression of concern on [Petitioner's] part about the impact that these added chores would have upon the public or the criminal [sic] justice system." 734 F.2d at 1010, App. 51.

These conclusions cannot be squared with the District Court's findings of fact. The District Court explicitly found that it was Petitioner's anticipation of the damage to her judicial function, and not personal pique, that was the motivation for her request for help. 555 F. Supp. at 716, App. 91. When a Judge who is already working from 9:00 a.m. until 6:00 p.m. and 8:00 p.m. has another half-hour to hour of clerical work added to her load, obviously both she and the justice system suffer. The three Civil Trial Magistrates handled about 145 cases per week per judge. 555 F.Supp. 715, App. 84. The Circuit Court has not made an independent assessment of the constitutional significance of the fact of Petitioner's motive; it has flatly

disagreed with the District Court's finding of motivational fact, but without finding it to be "clearly erroneous."

The Circuit Court then stated that Petitioner "sought to persuade her two colleagues to decline to do the additional microfilming while she sought to shift that responsibility to someone else (a proposal the other Magistrates apparently rejected)" and "publicly criticized the Clerk, but not to his face." 734 F.2d 1010, App. 51-52, 52. The Record indicates that Petitioner asked the other civil trial Magistrates, "would they hold off until we got something back from [supervisor Judge Saunders] as to whether we had to do the microfilming." App. 150. There is no evidence Petitioner sought to "persuade" the other magistrates to do anything. There is nothing in the record about what the other trial magistrates did in response to Petitioner's

remarks.[12] There is also no record testimony at all that Petitioner "publicly criticized the Clerk." Respondent Snepp testified that he "found [Petitioner] was complaining to other people and doing so publicly." App. 203. The panel majority noted that Judge Snepp was unable to identify, on cross-examination, the facts on which he based this opinion. 734 F.2d 1007-08, App. 37-38.

The Court of Appeals then stated:

> "As further evidence that [Petitioner] was interested only in her own personal workload, her testimony reveals that in her opinion the additional microfilming required an additional one-half to one hour per day of her time, although she admitted this was not true 'every day.'" 734 F.2d 1010, App. 52-53.

Petitioner testified that the additional microfilming required an additional one-

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[12] There is no record evidence that Respondent Blackburn knew, at the time of his failure to reappoint Petitioner, that she had spoken to the other Civil Trial Magistrates.

half to one hour per day on the average. App. 145. The Court's implication that the half hour to one hour was only required occasionally is not warranted by the testimony. Further, the fact that the additional microfilming would require additional time does not rationally tend to prove that Petitioner opposed it only for that reason.

The Court of Appeals then went on to state that the "root" of its ultimate conclusion that no matter of public concern was presented was that in its view a Magistrate was not primarily a Judge but essentially a clerk. 734 F.2d 1011, App. 54-55. In support of this conclusion, the Circuit Court stated that "the bulk of a Magistrate's time is spent doing clerical work," and "the average Magistrate spends more than 50% of his or her time sitting at a typewriter filling out criminal summonses, warrants for arrests, commitment papers, bond papers, small claims judg-

ments, or one of the other documents and forms for which he or she is responsible." 734 F.2d 1011, App. 55. Neither of these statements has any record support. The only testimony at trial on this subject was that Petitioner was a Constitutional judicial officer and heard civil cases. She would not be involved with "criminal summonses, warrants for arrests," etc. Yet the Circuit Court stated that Petitioner had no constitutional protection, because she was not concerned with "the impact that these added chores would have on the public or the criminal justice system." 734 F.2d 1010, App. 51 (emphasis supplied). Judge Ervin, the author of the Circuit Court opinion, was previously a North Carolina Superior Court Judge, in a District adjacent to Respondent Snepp. See, Vol. 297, N. C. Reports, p. vii. His statements may be based on his observations in that post. They are not based on any evidence in the

record.

The panel dissent[13] also redetermined the facts bearing on Petitioner's petitioning for redress of grievance. The District Court found as a fact that the Respondent Clerk did not renominate Petitioner because..."she talked about the problems with...members of the legislative delegation." 555 F.Supp. at 716, App. 93-94. The District Court also found as a fact that Respondent Judge Snepp declined to reappoint Petitioner for the same reason, 555 F.Supp. at 718, 724, App. 134-35, and also because she filed this suit, 555 F.Supp. at 725, App. 135. Judge Ervin's opinion offered an alternative theory of why Respondent Judge Snepp did not reappoint Petitioner: that he was piqued, not

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[13] The En Banc Opinion, App. 1, apparently did not adopt this portion of Judge Ervin's opinion, but only his "public concern" analysis.

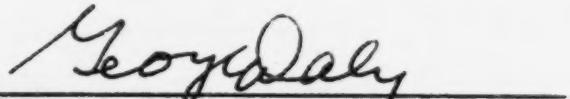
by her having spoken to the legislators, nor by her having sued him, nor by her having obtained a preliminary injunction, but because of the "nature of the order issued by the Federal District Court." 734 F.2d at 1012, App. 59. In particular, Judge Ervin theorized that the District Court's Order that Respondent Blackburn write to Respondent Judge Snepp and tell him that his renomination of Petitioner was "for real" was Respondent Judge Snepp's motivating factor. Again, the District Court spoke to the matter, and its finding of fact is not claimed to be clearly erroneous. A First Amendment case is not an opportunity for the Court of Appeals to find motives as it wishes to find them, without attention to Rule 52(a). Thus Judge Ervin's view of what the evidence shows should not be allowed to control the case.

Judge Ervin expressly recognized the

protected nature of Petitioner's conversations with the Legislators, but stated that "there is no suggestion that Snepp and Blackburn held this against her." 734 F.2d at 1012, App. 61. This simply is not so. There are District Court findings of fact foursquare to the contrary. 555 F.Supp. at 716, 718, 724; App. 93-94, 103-04, 134-35.

The Circuit Court has gone beyond a searching examination of the record in this case, such as would be appropriate to the determination of an ultimate constitutional question, and redetermined critical historical and motivational facts in violation of Rule 52 and based on evidence not in the record.

Respectfully submitted, July 22, 1985.



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1040(L)

Georgia J. Lewis,	Appellee,
v.	
R. Max Blackburn,	Appellant,
and	
Frank W. Snepp,	Defendant.
North Carolina Civil Liberties Union,	Amicus Curiae/E

No. 83-1041

Georgia J. Lewis,	Appellee,
v.	
R. Max Blackburn,	Defendant,
and	
Frank W. Snepp,	Appellant.
North Carolina Civil Liberties Union,	Amicus Curiae/E

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 82-565)

Argued: October 2, 1984
Decided April 24, 1985

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN and WILKINSON, Circuit Judges.

Harry H. Harkins Jr., Assistant Attorney General (Rufus L. Edmisten, Attorney General, Millard R. Rich, Jr., Deputy Attorney General; Jane S. Barkley on brief) for Appellants; George Daly for Appellee; (Daniel H. Pollitt; Norman B. Smith; Dean Shangler, Law Student, University of North Carolina, Jay Trehy, Law Student, University of North Carolina on brief) for Amicus Curiae.

PER CURIAM:

For the reasons adequately set forth in Judge Ervin's dissent to the original panel opinion, Lewis v. Blackburn, 734 F.2d 1000, 1008-1012 (4th Cir. 1984), we reverse the decision of the district court. We hold that the district court erred as a matter of law in finding that Georgia Lewis was not reappointed because she protested matters of public concern rather than matters of her immeidate self-interest, within the meaning of the Supreme Court's ruling in

Connick v. Myers, 461 U.S. 138 (1983).1/ Accordingly, the decision of the district court is reversed and the case is remanded for the entry of judgment in favor of the defendants.

Chief Judge Winter and Judge Wilkinson would affirm the district court's decision. They dissent on the grounds articulated in the original panel's majority opinion. Lewis, 734 F.2d at 1000-08. REVERSED AND REMANDED.

1/ The decision in Connick was not handed down until after the district court rendered its decision in this case, but the parties were invited to and did file supplemental briefs in response to that opinion.

[*]
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1040(L)

Georgia J. Lewis,	Appellee,
vs.	
R. Max Blackburn,	Appellant,
and	
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North Carolina Civil Liberties Union,	Amicus Curiae/E

No. 83-1041

Georgia J. Lewis,	Appellee,
vs.	
R. Max Blackburn,	Defendant,
and	
Frank W. Snepp,	Appellant.
North Carolina Civil Liberties Union,	Amicus Curiae/E

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 82-565)

Argued: March 7, 1983 Decided: May 17, 1984

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and ALDRICH,* Senior Circuit Judge.

[*] 734 F.2d 1000

*Honorable Bailey Aldrich, Senior United States Circuit Judge for the First Circuit, sitting by designation. Harry H. Harkins, Jr., Assistant Attorney General, Millard R. Rich, Jr., Deputy Attorney General (Rufus L. Edmisten, Attorney General, Jane S. Barkley on brief) for Appellants; George Daly for Appellee; (Norman B. Smith, Daniel H. Pollitt, Univ. of North Carolina, School of Law, and Dean Shangler and Jay Trehy, Third Year Law Students on brief as Amicus Curiae.)

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WINTER, Chief Judge:

Since August, 1978, Georgia Lewis has served as a magistrate in the state courts of Mecklenburg County, North Carolina. Under Article IV, Section 10 of the North Carolina Constitution, magistrates are appointed every two years by the senior resident superior court judge of the county from a list of nominations submitted by the clerk of superior court; once appointed, magistrates serve as officers of the county district court and report to the

chief district judge. N.C. Gen. Stat. Sections 7A-170-171.

In the summer of 1982, following a dispute over job assignments with Max Blackburn, the clerk of superior court, Lewis learned she would not be renominated by Blackburn for the new term of office commencing January 1, 1983. She promptly filed suit under 42 U.S.C. Section 1983, contend[*]ing primarily that Blackburn's refusal to renominate her resulted from the exercise of her first Amendment right of free speech 1/ Later, the senior resident superior court judge, Frank Snepp, was added as a defendant after he refused to reappoint Lewis as a

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1/ The constitutional prohibition against government infringement of speech applies to states under the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652, 666 (1975).

[*] 734 F.2d 1002

magistrate. The district court ultimately found in Lewis's favor, 555 F.Supp. 713 (W.D.N.C.), and ordered Lewis's immediate reappointment. That order was stayed by us pending appeal. We now vacate that order and affirm.

I.

The facts of this case are set out in exacting detail in the opinion of the district court. We need only to summarize them:

Georgia Lewis was appointed a Mecklenburg County magistrate in 1978 to fill a vacant position. She was reappointed for a regular biennial term from January 1, 1979, to December 31, 1980. Her appointment was again renewed in 1980 for the period from January 1, 1981, to December 31, 1982. In the summer of 1982, she had major

responsibility for the small claims docket of the district court.

On July 13, 1982, Max Blackburn, the clerk of superior court, sent a memorandum to all civil trial magistrates ordering them to begin microfilming small claims documents in addition to other microfilming duties already handled by magistrates. Blackburn claimed authority to issue this directive under the "Record Keeping Manual" of the State Administrative Office of the Courts and pursuant to his supposed supervisory authority over record keeping by magistrates. See N.C. Gen. Stat. Section 7A-175. However, the lawfulness of Blackburn's directive is hotly contested by the parties. Lewis strongly protested this additional work burden, and she carried her objection

to the chief district court judge. He advised her to speak to the senior resident superior court judge for Mecklenburg County, defendant Judge Frank Snepp, to the state Administrative Office and also to state legislators who could procure more money for the court system. Accordingly, she took the matter to Judge Snepp and to North Carolina State Representatives Parks Helms and Louise Brennan and local officials to complain of Blackburn's assignment, to question Blackburn's authority over her, and to request that additional magistrates be allocated to Mecklenburg County by the General Assembly. All those to whom Lewis spoke felt that Blackburn had statutory authority to require the additional work, and starting in August, 1982, Lewis complied with the directive

(although she still protests its validity).

On September 8, 1982, Blackburn wrote Lewis informing her that "since you have had difficulty in working with departments with important responsibilities and have refused to keep records as prescribed by the 'Record Keeping Manual,' I cannot consider nominating you to the office of magistrate for another term."

Lewis immediately filed suit in federal court, principally alleging that Blackburn's decision not to reappoint her violated her First Amendment rights to freedom of speech and to petition the government for a redress of grievances. Lewis charged that but for her speech critical of Blackburn regarding the microfilming assignment, Blackburn "would have placed her name first

on the list of nominees, thereby under prevailing custom guaranteeing her reappointment."

A hearing was held on November 22, 1982, after which the district court ruled that Blackburn had violated Lewis's First Amendment rights. The district court specifically found that certain prior complaints from lawyers and the general public about Lewis were not the "genuine reasons" behind Blackburn's decision not to renominate her, contrary to Blackburn's assertions. The district court ordered Blackburn to nominate Lewis for reappointment and to indicate to Superior Court Judge Frank Snepp, who was to make the final [*] selection of magistrates, that the nomination was "for real." Blackburn promptly complied

[*] 734 F.2d 1003

submitting to Snepp, as required by law, Lewis's name and that of one other nominee for the same position, Gerald Frederick.

On December 28, 1982, Judge Snepp declined to appoint Lewis, naming Frederick instead. In a letter to Blackburn, Judge Snepp wrote:

> "Since you were ordered by Judge McMillan to use this specific language,I can only conclude that this is an attempt by him to influence, if not coerce me, to appoint Ms. Lewis regardless of my judgment as to whether it would be in the best interest of the magistrate system to do so. Although it is my general policy to reappoint magistrates who have rendered satisfactory service, in order to give some assurance of tenure, I am deeply and sincerely opposed to unwarranted intrusion upon the legitimate responsibilities and duties of a state judge by federal courts. I regard the language used in Judge McMillan's order ... as such an intrusion ... I therefore decline as a matter of principle to reappoint Ms. Lewis."

He further indicated that plaintiff was not appointed because "the plaintiff was a malcontent, whose appointment to another term would not be in the best interest of the court system." Shortly thereafter, Judge Snepp was joined as a defendant in this case. After a hearing on January 10, 1983, at which Judge Snepp testified at length, the district court found that but for the microfilming incident, Judge Snepp would have reappointed Lewis. The district court thereupon held that Judge Snepp had violated Lewis's First Amendment rights and ordered him to appoint Lewis to a magistrate's position at once. From that order the defendants appeal.

II.

Before addressing the merits of this case, we first consider defendants'

contention that under the principles stated in Younger vs. Harris, 401 U.S. 27 (1971) and subsequent decisions, the district court should have abstained from interfering in certain state judicial proceedings. We note at the outset that defendants made no claim of abstention in the district court. We would be justified in refusing to consider the defense because a party should not be permitted to withhold a claim at trial and invoke it only on appeal when the result of the trial is adverse to him. But in any event, we think that the contention is lacking in merit.

The Younger principles, in our view, apply only when there are ongoing state criminal proceedings or state civil proceedings involving important state issues. In his case, the only

"proceedings" is the decision by Judge Snepp whether or not to reappoint Lewis. The district court found this to be a ministerial, not a judicial, act. Moreover, the appointment decision was a unilaterial, ex parte act, not an adversary proceeding which provided a forum for the airing and adjudication of Lewis's First Amendment claim. While North Carc ina does provide state judicial process whereby Lewis can challenge Judge Snepp's alleged violation of her First Amendment rights, that fact is irrelevant. Under Younger, the deference which is due is to Judge Snepp's decision, not to any future proceedings which Lewis could institute. The availability of a state remedy goes to the question of whether exhaustion of state remedies is a

prerequisite to a suit under 42 U.S.C. Section 1983, and it has been held that exhaustion is not required. See Monroe v. Pape, 365 U.S. 167 (1961).

In summary, because there is no currently pending proceeding that is capable of adjudicating Lewis's First Amendment claim, we hold that the principles of Younger do not apply. See Steffel v. Thompson, 415 U.S. 452 (1974).2/ [*]

III.

To begin our consideration of the merits, we discern no clear error in

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2/ By contrast, in Lynch v. Snepp, 472 F.2d 769 (4 Cir. 1975), on which defendants mistakenly rely, state proceedings in which plaintiff's claim could be adjudicated were currently pending when suit was instituted in a federal district court. That fact distinguishes Lynch from this case and makes Lynch inapposite.

[*] 734 F.2d 1004

the district court's findings of fact pertaining to the defendants' motives. See Fed. R. Civ. P. 52 (a). In particular, we offer no quarrel with the finding of fact that Blackburn declined to renominate Lewis because she spoke out against the microfilming assignment. 555 F.Supp. at 716. Similarly, we accept the district court's finding that Snepp refused to reappoint Lewis because of her vocal opposition to Blackburn's directive. Id. at 718.

Even if we assume that Lewis had no property interest in her position,3/

3/ The district court found that Lewis did have a legitimate expectation of reappointment to, and hence a property interest in, her position as a magistrate. He based this conclusion on Judge Snepp's testimony that he almost invariably reappointed incumbents specifically in order to give them some sense of tenure. We do not, however, find it necessary to rest on this finding.

it is true that Blackburn or Judge Snepp could have refused to renominate and reappoint her for a foolish reason or for no reason at all. Board of Regents v. Roth, 408 U.S. 564 (1972). It is equally clear, however, that they could not lawfully have refused to renominate and reappoint her for an unconstitutional reason, such as in retaliation for the exercise of rights protected under the First Amendment, as applied to the states through the Fourteenth Amendment. Perry v. Sinderman, 408 U.S. 593 (1972). The issues that must be addressed in this case, therefore, are whether the district court was correct in deciding that Lewis's actions were protected under the First Amendment and, if so, whether the district court was correct in concluding that, but for those

actions, she would have been renominated and reappointed to her position by Blackburn and Judge Snepp. Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).

A.

Resolution of the question of whether a public employee's speech is protected under the First and Fourteenth Amendments so that adverse employment action may not be based upon that speech is governed primarily by the Supreme Court's decisions in Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Myers, 51 U.S.L.W. 4436 (1983). Those cases made clear that public employees cannot, as a condition of their employment, be required to relinquish their First Amendment rights to comment on matters of legitimate public concern even in connection

with the operation of the state government for which they work. Pickering, 391 U.S. at 568; Connick, 51 U.S.L.W. at 4437.4/ Thus, as a threshold matter, the speech must have been upon a matter of public concern. Connick, 51 U.S.L.W. at 4437-38. If it was, the propriety of the dismissal depends upon a balancing test. In accommodating both the employee's First Amendment rights and the state employer's legitimate interest in the efficient operation of government, the

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4/ On the other hand, those cases plainly state that public employees do not have carte blanche to speak about matters that are not of interest to the general public, and that employment may, in certain circumstances, be conditioned on both content and content-based restrictions where necessary to the effective functioning of government.

the Court in Pickering articulated four basic factors to be considered: first, was the criticism or comment directed at any person with whom the employee will be in daily contact, thus affecting discipline by immediate superiors or harmony among coworkers; second, is the relationship between the employee and the person criticized a close working relationship for which it can persuasively be claimed that loyalty and confidence are necessary to their proper functioning; [*] third, did the criticism or comment damage the personal reputation of the person criticized; and fourth, were the issues spoken about matters of public interest in the administration of state or local government? See also Connick, 51 U.S.L.W. at 4439-40.

[*] 734 F.2d 1005

As we have indicated, the threshold question is whether Lewis's speech was upon a matter of legitimate public concern, or was instead relevant solely to her as an employee. To our minds, the fact that a judicial system is so understaffed and underfunded that judges are required to spend their time microfilming case documents other than judgments rather than performing judicial duties is of substantial concern to the public. Not only may this mean that too little time is being spent deciding cases, it may also mean that high-paid magistrates are performing clerical duties, thus wasting taxpayer dollars.

Moreover, the public nature of this issue is demonstrated by reply of the chief district court judge (Chief Judge Saunders) to Lewis's questions to him. Rather than tell her to suppress

her complaint or to speak to Blackburn, he recommended that she speak to state legislators who could procure more money for the court system, or to Judge Snepp, who was more able to influence state legislators to the same end. Judge Snepp also indicated at trial that Lewis's desire to have clerical help with the microfilming was properly addressed to the legislature. We think that matters suitable for legislative attention are matters of public concern.

We therefore conclude that Lewis's speech was protected speech under the First and Fourteenth Amendments, and we turn to the question of whether the content or context of that protected speech justified Blackburn's or Judge Snepp's decision not to reappoint her.

As noted above, this analysis implicates the factors set forth in Pickering.

Tested by the Pickering factors, Mrs. Lewis's speech fell within the range of protected expression. First, magistrates in North Carolina are independent constitutional officers, not members of a clearly hierarchical chain of employment relationships. They hear and adjudicate cases by themselves, rather than working in group or collegial settings. To the extent that Lewis had an immediate supervisor, it was Chief District Judge Saunders, and it was he who suggested that she take her questions about the microfilming order to Judge Snepp, the Administrative Office, and the state legislature.

To the extent that Lewis is required to work with Blackburn on record-keeping matters, it cannot persuasively be claimed that confidence and loyalty are necessary to the proper functioning of this relationship, and the district court so found. Absolutely no facts were presented at trial to indicate why Blackburn and Lewis would be unable to cooperate sufficiently in the future to ensure performance of these administrative tasks. In addition, Lewis's complaint was made in the context of a reasonable belief that Blackburn did not have the authority to issue her this order; there is no indication that she was unwilling to follow any order he issued that was not apparently in direct conflict with the clear language of the Administrative Office Record Keeping Manual

or with any order issued by Judge Snepp or Chief Judge Saunders.

Moreover, it is apparent that Lewis's comments in no way damaged the personal reputation of Blackburn or any other member of the state judicial system.

Finally, Lewis's comments dealt with the inadequacy of the clerical help available to state magistrates and to the fact that magistrates' time, which would be better spent deciding cases, was being spent performing clerical duties. The public airing of such matters undoubtedly involves the public interest, and the private communication of this matter to Judge Snepp, who has the visibility and influence to request additional clerical help, is similarly justified. In sum, we think that Lewis's speech dealt with an area

of obvious public interest, was directed (at Chief Judge Saunders' suggestion) to appropriate state officials, and was not of a nature or in a setting that threat[*]ened satisfactory future operation of this portion of the state judiciary.

We therefore conclude that Mrs. Lewis's speech was protected expression under Pickering and could not lawfully form the basis for adverse employment action by the state or its officers. We do not doubt that Lewis's motivation in giving voice to her complaints may have stemmed in part from personal pique at being assigned additional duties. But the fact that she was moved by a sense of personal effrontery does not exclude the fact that she spoke to a matter of public interest. The district court

[*] 734 F.2d 1006

found, and its finding is not clearly erroneous, that Lewis "did not feel that she should stop doing her judicial work and start doing microfilming for the Clerk."

We also conclude--although we do not think that this played a role in Blackburn's or Judge Snepp's refusal to renominate and reappoint Lewis--that Lewis's refusal to obey the microfilming directive was conduct not protected by the right to free speech. It is conceded that for several weeks Lewis refused to obey the Clerk's directive. But the clear language, at the very least,5/ of the state statute

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5/ The district court found, as a fact, that the Clerk indeed did lack the authority to issue the microfilming order. The plain language of the state statute and regulations indicate that the Clerk lacked the authority.

and regulations indicated that the Clerk had no authority to issue such a directive. The statute provided that magistrates are to perform clerical duties under the Clerk's supervision, as prescribed by the Administrative Office. The Administrative Office's Record Keeping Manual explicitly stated that the Clerk was to perform all microfilming and did not mention any power of the Clerk to delegate this duty to the magistrates. It seems apparent, thus, that Lewis had a reasonable belief that she was not disobeying a proper order from a person who had the authority to issue such an order. Moreover, when she sought out her immediate supervisor, Chief Judge Saunders, he, rather than ordering her to comply, invited her to bring the matter to the attention of Judge Snepp,

the Administrative Office, and state legislators with the authority to provide additional funds for clerical help. When Chief Judge Saunders subsequently informed Lewis that he had concluded that Blackburn did have the authority to issue the microfilming directive, she complied immediately. Under these circumstances--to which should be added the district court's factual finding that Lewis's two-week noncompliance caused no disruption--we cannot conclude that Lewis's refusal to obey the order constituted conduct outside the protection of the First and Fourteenth Amendments.

B.

We turn next to whether, given that the speech was protected and was not a proper basis for dismissal, Blackburn's and Judge Snepp's decisions not to reappoint Lewis were made

in retaliation for that speech. The district court found, as a matter of fact, that Blackburn would have renominated Lewis but for her exercise of free speech in protesting to Judge Snepp, the Administrative Office, and the state legislators his order assigning additional clerical duties to magistrates. We think that this finding is fully supported by the evidence of record.

At trial, Lewis testified that immediately upon receiving the letter from Blackburn informing her that he would not renominate her, she went and asked him for his reasons. She testified that he told her that he would not have her going over his head to judges or legislators, and that he could fire whomever he pleased, whatever the

reason. Blackburn denied making these statements, but Judge Snepp subsequently testified that Blackburn had informed him that he, Blackburn, was angry because Lewis had gone over his head in complaining about the directive. Therefore, not only was the district court in the best position to decide whether to credit Lewis's or Blackburn's version of their conversation, but Judge Snepp's own testimony supported Lewis's version. In addition, Black[*]burn asserted that he had actually decided many months earlier not to renominate Lewis, based on complaints he claimed to have received from lawyers and members of the public regarding her performance in office. But Blackburn was unable to furnish any documentation or other

[*] 734 F.2d 1007

evidence of such complaints in the period prior to when he claimed to have made this decision. Blackburn also conceded that he had never looked into the substance of any of these complaints. We do not think that it can be said that the district court was clearly erroneous in disbelieving Blackburn's claim that he had decided not to renominate a magistrate he had already renominated twice on the basis of unsubstantiated complaints that he was unable to produce. In our opinion, this pretextual justification simply lends further support to the district court's conclusion that Blackburn would have renominated Lewis but for her decision to question his authority by going over his head to Judge Saunders, Judge Snepp, and the state legislators regarding the microfilming directive.

We think, therefore, that the district court was correct in finding that Mr. Blackburn's action was based on Lewis's protected speech, rather than on her performance in office or her conduct in temporarily refusing to obey his order, and that such action was therefore in violation of Lewis's rights under the First and Fourteenth Amendments.

The district court also found, as a matter of fact, that Judge Snepp's refusal to reapoint Lewis, once Blackburn had renominated her, was based upon Lewis's protected speech in questioning to him the microfilming directive and upon Judge Snepp's indignation that the district court had issued a mandatory injunction addressed to Blackburn on Mrs. Lewis's behalf. We think that this finding, too, is amply supported by the evidence of record.

First, although Judge Snepp testified that he considered Lewis to be a "malcontent," the evidence showed that this opinion was based upon his having taken offense at her decision (at Chief Judge Saunders' suggestion) to speak to him regarding the microfilming directive. Moreover, the letter written by Judge Snepp to Blackburn explaining Judge Snepp's refusal to reappoint Lewis makes clear that Judge Snepp's decision not to reappoint Lewis was in retaliation for the federal court order she obtained in the process of protecting rights secured to her by the United States Constitution. As her activities in seeking such redress were unquestionably protected by the First

and Fourteenth Amendments,6/ we conclude that the district court was correct in ruling that Judge Snepp's action was in violation of Lewis's constitutional rights.

Indeed, Judge Snepp's forthrightness in revealing the basis for his action was explained by his repeatedly erroneous assertions at trial regarding his understanding of his legal prerogatives regarding the decision not to reappoint Lewis. Judge Snepp testified that, in his view, he had unbridled discretion in making that decision and that, also in his opinion, the First Amendment could not possibly be relevant absent proof that he engaged in a pattern of discrimination, in that

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6/ See United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

Lewis had no property interest in her position. But Perry v. Sinderman, supra, makes clear that Judge Snepp was in error; he could not lawfully refused to reappoint her in retaliation for her speech or her attempts to seek redress in the federal courts, regardless of whether she had a property interest in her position under state law.

Judge Snepp also took the position at trial that he had long ago decided not to reappoint Lewis regardless of Blackburn's recommendation, because in his opinion her "talking around the courthouse" about the Clerk's authority was bad for morale (in effect thus claiming that it was not protected speech). But Judge Snepp, in response to repeated questions from plaintiff's counsel, was unable to identify the

facts on [*] which he based this opinion, and he concluded that he has essentially no contact with the magistrates. In addition, Judge Snepp admitted that he had a policy to reappoint magistrates absent quite unusual circumstances; he admitted that he had reappointed forty-one of the last forty-two incumbents, refusing appointment only to a magistrate who, when arrested for drunken driving, had forcibly resisted arrest. Based on all of this evidence, we think that the district court was not clearly erroneous in finding that Judge Snepp's decision not to reappoint Lewis had been made in retaliation for her exercise of her First and Fourteenth Amendment rights to free speech and to redress in the federal courts.

[*] 734 F.2d 1008

Because Lewis therefore would have been renominated by Blackburn and reappointed by Judge Snepp but for the exercise of those protected rights, we conclude that she had established a meritorious claim under 42 U.S.C. Section 1983.

IV.

The district court concluded that, in order to provide adequate relief for the violation of Lewis's constitutional rights, a mandatory injunction should issue requiring Judge Snepp to reappoint Lewis to the two-year term in her magistrate position. Judge Snepp argues that, as a state judicial officer, he was immune from such relief. The well-estabilshed general rule in this circuit, however, is that judicial immunity will not bar injunctive relief. See Timmerman v. Brown,

528 F.2d 811 (4 Cir. 1975); see also Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 735 n.14 (1980) (strongly implying concurrence in this view). In the present case, monetary damages are barred by Judge Snepp's judicial immunity; Lewis therefore has no adequate remedy at law, and injunctive relief should be available to remedy unconstitutional state action. It should be noted that the mandatory injunction here does not implicate the question of whether a federal court can order a state judge to exercise his discretion in one of the several equally possible ways; here Judge Snepp has conceded that he would have exercised his discretion to appoint Lewis but for her exercise of protected rights. We thus affirm that district court's mandatory injunction.

V.

Finally, Judge Snepp and Blackburn appeal from the district court's order awarding attorney's fees to Lewis, contending that the award constituted an abuse of discretion because they enjoy immunity. We see no abuse of discretion.

Attorney's fees are available in Section 1983 actions to plaintiffs who prevail against defendants with judicial immunity if those fees are incident to prospective injunctive relief. See Allen v. Burke, 690 F.2d 376 (4 Cir. 1982), petition for cert. granted, 51 L.W. 3774 (April 25, 1983). As the Supreme Court noted in Consumers Union, supra, 446 U.S. at 738-39, "[t]he House Committee Report on the [Civil Rights Attorneys Fees Award] Act indicates that Congress intended to permit attorney's

fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards." We therefore sustain the award.

The order staying the judgment of the district court is vacated and judgment is AFFIRMED.

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ERVIN, Circuit Judge, dissenting:

I respectfully dissent.

Like the majority, I discern no clear error in the district court's findings of fact pertaining to the defendants' motives. See Fed. R.Civ. P. 52(a). In particular, I offer no [*] quarrel with the conclusion that Blackburn declined to renominate Lewis because she spoke out against the microfilming assignment. 555 F.Supp.

[*] 734 F.2d 1009

at 716. Similarly, I accept the court's finding that Snepp refused to reappoint Lewis because of her vocal opposition to Blackburn's directive. Id. at 718.

The crux of the matter, then, is whether Lewis's complaints regarding the microfilming assignment could lawfully provide the basis for her non-reappointment.1/ A recent pronouncement by the Supreme Court convinces me that they could. After judgment in this case was rendered below, the Supreme Court handed down Connick v. Myers, _____ U.S. _____, 75 L.Ed.2d 708 (1983). Sheila Myers was employed as an Assistant District Attorney in New Orleans for over five years, serving at the

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1/ The protected status of speech is a question of law for the court to decide. Connick v. Myers, _____ U.S. _____, 75 L.Ed.2d 708, 720 n.7 (1983).

pleasure of the District Attorney, Harry Connick. During her tenure, she had ably performed her responsibilities of trying criminal cases. Then she was notified that she was to be transferred to a different section of criminal court, a move which she strongly opposed. She expressed her objections to several supervisors, including the District Attorney, but was unable to block the transfer. Myers then prepared a questionnaire soliciting the views of fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. The questionnaire was distributed to fifteen assistant

district attorneys. The District Attorney then dismissed Myers, obstensibly for refusing the job transfer. Myers sued under 42 U.S.C. Section 1983, contending that her employment was wrongfully terminated because she had exercised her constitutional right of free speech. The district court agreed and directed that she be reinstated. The court expressly found that the questionnaire, not the refused transfer, was the real reason for Myers's dismissal. The court reasoned that the questionnaire involved matters of important public concern and that the state had not clearly demonstrated that the survey substantially interferred with the operations of the District Attorney's office. See Pickering v. Board of Education, 391 U.S. 563, 568

(1968). The court of appeals affirmed on the basis of the district court's opinion.

On certiorari, the Supreme Court reversed. Justice White began the opinion by citing Pickering v. Board of Education, 391 U.S. 563 (1968), in which the Court held that a public employee does not relinquish first amendment rights to comment on matters of public interest by virtue of government employment. Justice White noted, however, that in Pickering the Court was careful to explain that the state's interests in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Id. at 568. The task was to arrive "at a balance between the interests of the [employee], as

a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Ibid. The Court made clear, however, that if the expression did not involve a matter of legitimate public concern, no First Amendment protection against discharge existed and no balancing was needed. Connnick at 719-720; Jones v. Dodson, _____ F.2d _____, slip op. at 12 (4th Cir. 1984).

Applying the teaching of Pickering to the facts in Connick, the Court concluded that Myers's questionnaire did not, with one exception,2/ involve

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2/ The Court agreed that the problem of political patronage, particularly pressure to join political campaigns, was a matter of public concern. That issue is not present in this case.

comment on matters of legitimate public concern, but rather dealt with problems of internal office policy. The state was not therefore required to offset the gravity of a First Amendment claim with compelling proof that government functions were jeopardized by the exercise of speech. [*]

In reaching the conclusion that Myers's speech was personal in nature, the Court wrote that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers, 75 L.Ed. 2d at 720. Here, it is beyond dispute that Lewis's complaints began upon learning that she would be assigned additional duties. The record as I view it is

[*] 734 F.2d 1010

unequivocal that the motivation for her complaints was personal effrontery over being asked to do more work, not public-spirited concern over the administration of justice.3/ Cf. Pickering v. Board of Education, 391 U.S. 563 (1968) (where teacher openly criticized Board of Education for its allocation of funds between athletics and education, subject of speech was a matter of public concern for which teacher could not be fired); Perry v. Sindermann, 408 U.S. 593 (1972) (teacher who testified before Texas legislature in favor of four-year status for a state college could not be

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3/ The district court found that Lewis "did not feel that she should stop doing her judicial work and start doing microfilming for the Clerk."

could not be terminated on that ground by Board of Regents which opposed the change); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) (first amendment protection applied where public employee spoke privately with her employer on subject of race discrimination in the workplace).

The seeds of this unseemly controversy can be discovered in Lewis's own deposition in which she admitted that she was not initially aware that Magistrates did their own typing and microfilming of documents. She learned this in the course of her training although she candidly admitted that "I don't like to microfilm."

Be that as it may, the day came when Blackburn issued the directive requiring the three civil magistrates

to do additional microfilming. Lewis's reaction to this directive is instructive and illuminating. I can find no suggestion on her part that the quality of her work -- judicial or otherwise -- suffered. A careful reading of the record fails to disclose any expression of concern on Lewis's part about the impact that these added chores would have upon the public or the criminal justice system. She was disturbed only because she was going to have to do more work, and she wanted to avoid that by finding someone else upon whom to impose the burden.

I find her reactions interesting. At no time did she approach Blackburn, the source of her discomfort. Instead, she (1) sought to persuade her two colleagues to decline to do the additional microfilming while she sought

to shift that responsibility to someone else (a proposal the other magistrates apparently rejected); (2) refused to carry out the Clerk's directions for two full working weeks; and (3) by that refusal, she caused the other magistrates and employees of the Clerk's office to do her work for her. She also publicly criticized the Clerk, but not to his face. It requires no imagination to suggest that this conduct on her part further ruptured her relations with the Clerk and the personnel in the Clerk's office (which Lewis conceded was not good), and that it did not endear her to her co-workers in the magistrates' corps.

As further evidence that Lewis was interested only in her own personal work load, her testimony reveals that in her opinion the additional microfilming

required an additional one-half to one hour per day of her time, although she admitted that this was not true "every day." Her displeasure centered on her own overtime work and her inability to leave the office at 5:00 p.m. Her principal overtime complaint seems, however, to focus on a single week when one civil trial magistrate was on vacation and the other was on a special assignment training a new criminal magistrate.

The facts of our case, therefore, are even less conducive to a finding of "expression [*] based upon public concern" than those at issue in Connick, where a public questionnaire dealng with a variety of issues was sent out to all employees. If the Supreme Court was not willing to find protected expression

[*] 734 F.2d 1011

in that case, I am hard pressed to see how we can find it here.

Perhaps the root of my disagreement with the majority on this point lies in what I believe to be its erroneous assumption that a Magistrate under the North Carolina system is primarily a judge and that Lewis was unable to perform her judicial duties because she was being required to spend time microfilming. A Magistrate is "an officer of the district court"4/ who carries out some narrowly circumscribed judicial functions,5/ but the bulk of a

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4/ N.C.G.S. Section 7A-170.

5/ N.C.G.S. Sections 7A-211; 7A-273; 7A-292.

It should be noted that many of these functions, including the hearing of "small claims actions," can be performed by a Magistrate only if the chief district judge, in his discretion, permits the Magistrate to do so.

magistrate's time is spent doing clerical work. I venture to say that the average magistrate spends more than fifty per cent of his or her time sitting at a typewriter filling out criminal summonses, warrants for arrest, commitment papers, bond papers, small claims judgments, or one of the other documents and forms for which he or she is responsible. To my knowledge, no North Carolina Magistrate has ever been furnished clerical assistance, and all of them do their own typing.

Connick also held that "when employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the superior's view that the employee has threatened the

authority of the employer to run the office." Id. at 724. This is precisely the situation I find here. Lewis chose a somewhat milder form of publicizing her grievances than did Sheila Myers, yet it cannot be said that disruption was not felt in the clerk's office. While it is true that there is no employer-employee relationship between the clerk and the magistrates (by statute, the magistrates report to the local chief district judge), operations of the two offices are intimately interwoven. Section 7A-175 of the North Carolina General Statutes states that "a magistrate shall keep such dockets, accounts, and other records, under the general supervision of the clerk of superior court, as may be prescribed by the Administrative Office of the

Courts." Only three civil magistrates serve Mecklenburg County. The recalcitrance of one is patently disruptive to the effective operation of the local courts.

In short, I think that the sum and substance of Georgia Lewis's complaint was that she had too much work to do and could not absorb additional duties. While I am sympathetic to her grievance, I find in her protest only matters of self-interest rather than issues of public concern.6/

6/ In light of my view that the genesis of this case was an internal dispute devoid of public interest, it makes no difference who was right substantively on the issue of whether Blackburn had power to assign microfilming duties. As the Connick Court makes clear, sometimes antagonistic employees are fired (or in this case, not renominated for their posts) although the employer is in the wrong on a matter of office policy. Connick, 75 L.Ed.2d at 719-20.

II.

The opinion of the district court implies a finding that Snepp refused to reappoint Lewis partly because she gained a judgment against Blackburn in federal court. This is difficult to reconcile with Snepp's uncontradicted testimony that he had formed the opinion at least as early as September 8, 1982, three and one-half months before the appointment deadline (and two and one-half months before Lewis obtained the judgment against Blackburn) that he would not appoint Lewis because she was a malcontent. Despite this, Lewis contends that Snepp's action violated her First Amendment right to petition the government for a redress of grievances. I [*] reject this position.

[*] 734 F.2d 1012

It was not Lewis's act of filing suit or obtaining judgment against Blackburn that triggered Snepp's empathic response; it was, rather, the nature of the order issued by the federal district court that offended the state judge. The district court found that under prevailing state custom in appointing magistrates, the senior resident superior court judge defers to the preference of the clerk, although by statute the ultimate decision rests with the judge. The district court's order to Blackburn to renominate Lewis and to tell Snepp that the nomination was "for real" presumed to strip Snepp of his independent judgment concerning whom to appoint. This was interpreted as an unwarranted intrusion by Judge Snepp, notably serious in the context of federal court intervention in the

functioning of state tribunals. Furthermore, Snepp correctly perceived the error in the district court's holding, that Lewis's speech was in fact not related to matters of public interest and, therefore, could not shield her from non-reappointment. Connick subsequently confirmed Snepp's reading of the law. The combination of an erroneous legal ruling and over-reaching relief7/ explains, if it does not fully justify, Snepp's response.

7/ I need not concern myself with whether it would ever be appropriate as a part of fashioning a suitable remedy for a federal judge to order a state judge to appoint a specific individual to a state office when the power of appointment is discretionary and is vested in the state judge, but such an order is not justified under the circumstances of this case.

Finally, I do recognize the protected status of Lewis's conversation with her state representatives concerning the possibility of procuring additional legislative aid for the magistrate corps; however, there is no suggestion that Snepp and Blackburn held this against her. Snepp testified without rebuttal that he supported Lewis's efforts to acquire funding for staff from the General Assembly.

III.

I am convinced that Georgia Lewis failed to gain reappointment as magistrate because she strenuously protested matters bounded by her immediate self-interest, not matters of public concern. I would reverse the judgment of the district court.

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-565-M

GEORGIA LEWIS, Plaintiff,)
)MEMORANDUM
-vs-)OF DECISION
) AND ORDER
R. MAX BLACKBURN,) (Filed
Defendant.) 12-3-82)

Plaintiff, Georgia Lewis, a magistrate in the District Court of Mecklenburg County, North Carolina, brought this suit alleging that defendant, R. Max Blackburn, Clerk of the Superior Court of Mecklenburg County, had wrongfully refused to recommend her for reappointment because of her sex and because she went over his head and talked with Superior Court judges and legislators and court administrators and others about questions involving her judicial duties.

I find no merit in her complaint of sex discrimination.

However, I find substantial merit in her claim that she was denied renomination because of her exercise of First Amendment rights. She is entitled to relief.

Plaintiff is one of a score of Mecklenburg County magistrates in the state court system. She was appointed on August 14, 1978, to fill an unexpired term. She was reappointed for two years on January 1, 1979, and on January 1, 1981, she was reappointed for a two-year term expiring December 31, 1982. She is one of three civil court magistrates; the eighteen other magistrates work primarily in criminal matters. Plaintiff is a college graduate, experienced in child welfare work, probation counseling and paralegal work.

Under General Statutes of North Carolina 7A-170, "a magistrate is an officer of the district court... A magistrate possesses all the powers of his office at all times during his term."

Under Chapter 7A-171 magistrates are (a) nominated by the Clerk of the Superior Court; (b) appointed from the nominees by the senior resident Superior Court judge; and, in Mecklenburg County, they are (c) supervised by the chief district judge.

On September 8, 1982, the defendant wrote plaintiff a letter which, in pertinent part, said:

> "Since you have had difficulty in working with departments with important responsibilities and have refused to keep records as prescribed by the 'Records Keeping Manual' I cannot consider nominating you to the office of Magistrate for another term."

On July 13, 1982, the defendant had issued a memorandum to all civil trial magistrates directing that in addition to microfilming judgments (which they were already doing), magistrates would "begin microfilming the following documents upon completion of a Small Claims Case:

1. The complaint;

2. All processes issued and returns made thereon;

3. Judgments

4. All orders and other documents signed by you."

The authority cited for this order, N.C.G.S. 7A-175, reads:

> "A magistrate shall keep such documents, accounts, and other records, under the general supervision of the clerk of superior court, as may be prescribed by the Administrative Office of the Courts." (Emphasis added.)

It is extremely doubtful that this statute and the regulations of the administrative office of the Courts authorize or require the Clerk to require these clerical services of the magistrates. The "Record Keeping Manual" of the Administrative Office of the Courts (plaintiff's Exhibit 48) does not direct the magistrates to perform the microfilming duty. The pertinent section of the AOC regulations, Rule 4E, reads:

> E. Microfilm. Each small claims case shall
>
> be microfilmed by one of the methods described in Rule 2. Regardless of the method chosen, the clerk shall microfilm the following documents:
>
> the complaint;

all processes issued and returns made thereon;

judgments;

all Orders and other documents signed by the judge or magistrate.

Rule 4E quite clearly places the burden of microfilming upon the "clerk."

When plaintiff received the directive from the clerk she challenged the propriety of the rule. At that time she had an extra heavy case load because one of the magistrates was out of service, she had several hundred cases on her desk, she was, as usual, doing her own typing, and she did not feel that she should stop doing her judicial work and start doing additional microfilming for the clerk.

She spoke to Chief Judge Chase Saunders to see if some relief could be

obtained. She talked to Senator Parks Helms and Senator Louise Brennan of the Mecklenburg legislative delegation about possibly getting a microfilming clerk. She talked with Chief Resident Superior Court Judge Frank Snepp and with a person from the Administrative Office of the Courts and with Tom Ray, Chairman of the Board of County Commissioners. She talked to the other magistrates. Chief Judge Saunders told her that he thought the clerk had the authority to require the magistrate to do microfilming. Eventually, after a week or two of futile explorations, she complied with the directive.

On the day the plaintiff received her "no renomination" letter of September 8, 1982, she talked with Mr. Blackburn, who mentioned the controversy over microfilming in connection with

his action. At that time he told her that he would not have plaintiff going over his head to talk with judges or county commissioners or legislators, and that he could fire "whom he pleased."

I find as a fact that the reason defendant did not recommend plaintiff for renomination was that she protested the additional clerical duties and because she talked about the problems with other persons concerned in the administration of the courts including a district judge, a Superior Court judge, a county commissioner, members of the legislative delegation, and a person from the Administrative Office of the Courts.

Defendant contended that he had decided not to recommend plaintiff some time back in "the middle" of 1981,

twelve or fifteen months earlier. The reasons for not recommending plaintiff, he said, were numerous complaints from lawyers, unsuccessful litigants and co-workers regarding plaintiff's attitude and her conduct in court. I do not believe that those were the genuine reasons. Blackburn had never spoken to the plaintiff about his intention not to renominate her until he wrote the September, 1982 letter. The only incident which involved any event which had happened during or before mid-1981 was a mix-up about assigned parking spaces -- the sort of thing that happens frequently in government parking lots. A government employee who has an assigned parking space and has not had some problems with it must be rare indeed; plaintiff's account of that

incident is more plausible than defendant's.

The earliest documented complaint about plaintiff's activities involved events which took place on September 22, 1981 (plaintiff's Exhibit 10). A review of plaintiff's exhibits 9 through 28 makes it clear that all or nearly all the complaints documented by defendant involved events which did not occur until after the mid-1981 time when defendant says he had already decided not to renominate plaintiff. The earliest such complaint involves a difference with a litigant about interest on a judgment, which took place on the 3rd of July, 1981 (plaintiff's Exhibit 16). The fact that all but one of the complaints took place after defendant says he had made his decision leaves the court with grave doubt that

the "complaints" had any bearing on his renomination decision.

The magistrate is a judicial officer. The functioning and the integrity of the office are dependent upon the preservation of that status. The legislature placed in the Administrative Office of the Courts the authority to designate those records which the magistrate might be required to produce or keep. The clerk's authority is limited to the supervision of such record keeping, but it does not appear from Chapter 7A-175 of the General Statutes of North Carolina that the Clerk had any authority to require the magistrate to keep records not prescribed by the Administrative Office of the Courts.

Regardless, however, of the merits of that particular issue, on which I

think the plaintiff had the better of it, the plaintiff and the public have an interest in plaintiff's exercise of free speech, including access to judicial, legislative, administrative and political figures, to seek information and help on matters affecting the administration of justice. If judges are going to be gagged, it is something that ought not to be left to the private discretion of the clerk of court.

The defendant is an able public servant, and for nearly a third of a century has been a personal friend of this court. I doubt that he thought he was trampling on anybody's First Amendment rights of free speech or that he was interfering with the functioning of a judicial system which he has spent most of his life serving. However, the

purpose of free speech is to keep public servants honest. It enables people to argue, above all, about the correct use of power and to complain about the use or misuse of public power without the risk of reprisal or punishment. The conduct of the plaintiff was protected Perry v. Sinderman, 408 U.S. 593 (1971), and related cases.

Plaintiff is entitled to relief. The parties are directed to confer and see whether any compromise settlement of their differences can be arranged, and to report back to the court. Since the nominations of the Clerk for appointments are due to be submitted to the court no earlier than "Tuesday after the first Monday" nor "later than the third Monday" in December, that conference and the communication to the court should take place immediately.

The defendant is ORDERED, pending further order of court, not to make any nominations which may result in filling plaintiff's present job as magistrate with any other person.

IT IS SO ORDERED, this 3 day of December, 1982.

James B. McMillan
James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-565-M

GEORGIA LEWIS, Plaintiff,) FINAL
) ORDER
-vs-) (Filed
)12/23/82)
R. MAX BLACKBURN, Defendant.)

On December 3, 1982, following an evidentiary hearing, a memorandum of decision and order was entered, finding pertinent facts and directing that the defendant not make "any nominations which may result in filling plaintiff's present job as magistrate with any other person."

On December 22, 1982, and December 23, 1982, further hearings were conducted. The parties have outlined for the record the state of their negotiations towards a possible resolution of the stalemate which has resulted. I once thought they had

agreed on a form of possible order, but now it appears they are still at odds and that the court, who had hoped for a spontaneous resolution of the issues by the state authorities, must now go ahead and do directly what it had tried to leave to the state defendant to do as a routine exercise of his regular authority.

Since a direct order now seems unavoidable, if plaintiff's First Amendment rights are to be recognized,

It Is Ordered, Adjudged and Decreed,

1. Defendant shall immediately nominate plaintiff, Georgia Lewis, for reappointment to her job as magistrate.

2. Since defendant's objections to reappointing plaintiff to her job are public knowledge, defendant shall also communicate immediately in writing with the appointing Senior Resident Judge of

the Superior Court and advise that this nomination is for real, and though he may appeal the order of this court, he is dead serious in asking the appointing Judge to go ahead and make the appointment of Mrs. Lewis as requested.

3. The order of December 3, 1982, is modified to read as follows:

> "The defendant is ordered, pending further order of court, not to make any nominations or take any further action which may result in filling plaintiff's present job as civil magistrate with any other person."

4. It will be consistent with this order for the defendant to require of Mrs. Lewis an agreement that if this order is reversed by an appellate court, she will tender her resignation as soon as the mandate of that court has been certified to this court.

5. Plaintiff's claims based on alleged sex discrimination are dismissed.

6. Plaintiff is entitled to costs and attorney's fees, which will be awarded later.

It is so ordered this, the 23rd day of December 1982.

James B. McMillan

James B. McMillan

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-565-M

GEORGIA J. LEWIS, Plaintiff,)
)
-vs-)
)
R. MAX BLACKBURN, Original) ORDER
Defendant,)
and)(Filed
)12-30-82)
FRANK W. SNEPP, JR.,)
Additional)
Defendant)

Based upon the memorandum of decision filed concurrently herewith and attached hereto, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the defendant Blackburn and his officers, agents, servants, employees, attorneys, and those persons in active concert or participation with him who receive actual notice of this order by personal service or otherwise, be, and they are hereby enjoined and restrained from administering or causing

or permitting the oath of office to be administered to any person for the job of magistrate presently held by the plaintiff, Georgia J. Lewis.

2. That copies of this order be duly served upon both defendants.

3. That a copy of this order be posted conspicuously and immediately at the Mecklenburg County Court House door, and at other places in the court house where public notices are customarily posted.

4. That the motion of plaintiff for leave to file and serve the "First Supplemental Complaint (adding Party Defendant)" be and it is hereby allowed.

5. That, unless rescheduled for convenience of parties and witnesses, a hearing on the question of the conversion of this order into a

preliminary injunction will be conducted on January 10, 1983, at 9:30 A.M.

6. The court would like to allow a motion of the parties to convert the January 10, 1982 hearing into a final hearing on all matters at issue, and enter a final judgment on the merits. The parties are requested to let the court know by January 5, 1983, whether they are agreeable that the January 10 hearing be a final trial on the merits.

7. The plaintiff shall post a bond, in cash or security, acceptable to the clerk, in the amount of $250.00, pursuant to Rule 65(c).

This 30th day of January, 1982.

James B. McMillan

James B. McMillan
United States District Judge

[*]
IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-565-M

GEORGIA J. LEWIS, Plaintiff	)	
vs.	)	MEMORANDUM
	)	OF
R. MAX BLACKBURN,	)	DECISION
Original	)	AND
Defendant,	)	FINAL
and	)	ORDER
	)	
FRANK W. SNEPP, JR.,	)	(Filed
Additional	)	1-13-83)
Defendant.	)	

George Daly, Suite 226, One North McDowell Street, Charlotte, North Carolina 28204, counsel for plaintiff.

Millard R. Rich, Jr., Deputy Attorney General, North Carolina Department of Justice, State Capitol, Raleigh, North Carolina 27602; and Jane S. Barkley, Legal Officer, Office of the Clerk of Superior Court, 800 East Fourth Street, Charlotte, North Carolina 28202, counsel for defendants.

Before James B. McMillan, District Judge

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[*] 555 F.Supp. 713

[*]

FINDINGS OF FACT

Plaintiff, Georgia J. Lewis, since August 14, 1978, has been one of a score or more of magistrates in the state court system for Mecklenburg County, North Carolina. Plaintiff is a college graduate, experienced in child welfare work, probation counseling and paralegal work. She was first appointed on August 14, 1978, to fill an unexpired term; she was reappointed for two years beginning January 1, 1979, and she was again reappointed on January 1, 1980, for a two-year term expiring December 31, 1982. Her recent service was as a civil court magistrate; with two others she shared a case load of about 22,000 cases a year (about 145 cases a week per judge). Her work has been satisfactory;

[*] 555 F.Supp. 715

until September, 1982 there was no record of any dissatisfaction on the part of appointing authorities with her performance as magistrate.

Under General Statutes of North Carolina 7A-170, "a magistrate is an officer of the district court .... A magistrate possesses all the powers of his office at all times during his term."

Under Chapter 7A-171 magistrates are (a) nominated by the Clerk of the Superior

Court; (b) appointed from the nominees by the senior resident Superior Court judge; and in Mecklenburg County, they are (c) supervised by the chief district judge.

The defendant R. Max Blackburn is the Clerk of the Superior Court; the defendant Frank W. Snepp, Jr., is the senior resident Superior Court judge; and in the summer of 1982 Chase Saunders was the chief district judge and the supervisor of the plaintiff.

On September 8, 1982, the defendant Blackburn wrote plaintiff a letter which, in pertinent part, said:

> "Since you have had difficulty in working with departments with important responsibilities and have refused to keep records as prescribed by the 'Records Keeping Manual' I cannot consider nominating you to the office of Magistrate for another term" (emphasis added).

* * * * *

Plaintiff talked with defendant Blackburn about his unfavorable letter and, getting no satisfaction, brought this suit seeking relief for alleged violations of her rights of free speech and redress of grievances under the First Amendment to the Constitution of the United States. A hearing was conducted on November 22, 1982, which resulted in an order dated December 3, 1982, restraining defendant Blackburn from making nominations which would fill plaintiff's then job with any other person. Further hearings were conducted on December 22, 1982, December 23, 1982, December 30, 1982 and January 10, 1983. Judge Frank W. Snepp, Jr., the senior resident Superior Court judge, was made a party; by agreement of counsel a final hearing on all matters remaining at

issue among all parties was conducted on January 10, 1983, and the case is now ready for final decision. The court has filed previous orders and memoranda on December 3, December 23, December 30 and December 30, 1982. This order duplicates substantial portions of those previous memoranda and orders. This order is based upon the entire record of the case and all the facts found in those previous memoranda and orders; and the omission of any previous finding from this order does not mean that such finding has been abandoned as a basis for this order.

* * * * *

Defendant Blackburn's September 8, 1982 letter based his decision not to renominate plaintiff in substantial part on plaintiff's refusal to keep records

"as prescribed by the Records Keeping Manual." [*]

On July 13, 1982, the defendant Blackburn had issued a memorandum to all civil trial magistrates directing that in addition to microfilming judgments (which they were already doing), magistrates would "begin microfilming the following documents upon completion of a Small Claims Case:

1. The complaint;
2. All processes issued and returns made thereon;
3. Judgments
4. All orders and other documents signed by you."

The statute Blackburn relied on for this order, N.C.G.S. 7A-175, reads:

[*] 555 F.Supp. 716

"A magistrate shall keep such documents, accounts, and other records, under the general supervision of the clerk of superior court, as may be prescribed by the Administrative Office of the Courts." (Emphasis added.)

The "Record Keeping Manual" of the Administrative Office of the Courts (Plaintiff's Exhibit 48) to which Blackburn referred in his September 8, 1982 letter, does not require the magistrates to perform the microfilming duty. The pertinent section of the AOC regulations, Rule 4E, reads:

E. Microfilm. Each small claims case shall be microfilmed by one of the methods described in Rule 2. Regardless of the method chosen,

> the clerk shall microfilm the following documents:
>
> the complaint;
>
> all processes issued and returns made thereon;
>
> judgments;
>
> all orders and other documents signed by the judge or magistrate. (Emphasis added.)

Rule 4E quite clearly places the burden of microfilming upon the "clerk."

When plaintiff received the directive from the clerk she challenged the propriety of the order. At that time she had an extra heavy case load because one of the magistrates was out of service; she had several hundred cases on her desk; she was, as usual, doing her own typing; and she did not feel that she should stop doing her judicial work and start doing additional microfilming for the clerk.

Plaintiff spoke to her supervisor, Chief Judge Chase Saunders, to see if some relief, such as extra clerical help, could be obtained. At Judge Saunders' suggestion (page 44, Transcript of November 22, 1982 hearing), she talked to Senator Parks Helms and Representative Louise Brennan of the Mecklenburg legislative delegation about possibly getting a microfilming clerk. She talked, at Judge Saunders' suggestion, with defendant Judge Frank Snepp. She also talked with a person from the Administrative Office of the Courts, and with Tom Ray, Chairman of the Board of County Commissioners. She talked with the other magistrates. Chief Judge Saunders told her that he thought the clerk had the authority to require the magistrates to do the microfilming.

Eventually, after a week or two of futile explorations, she complied with the directive to perform the extra clerical work.

On the day the plaintiff received her "no renomination" letter of September 8, 1982, she talked with Mr. Blackburn, who mentioned the controversy over microfilming in connection with his action. At that time he told her that he would not have plaintiff going over his head to talk with judges or county commissioners or legislators, and that he could "hire and fire who I please, whatever the reason."

I find as a fact that the reason Blackburn did not recommend plaintiff for renomination was that she protested the additional clerical duties and because she talked about the problems with other persons concerned in the

administration of the courts including District Judge Saunders, her supervisor; a Superior Court judge; a county commissioner; members of the legislative delegation; and a person from the Administrative Office of the Courts.

Blackburn had never spoke to the plaintiff about his intention not to renominate her until he wrote the September, 1982 let[*]ter. The only controversial incident involving plaintiff which had happened during or before mid-1981 was a mix-up about a parking space that had been assigned to her -- the sort of thing that happens in government parking lots. A government employee who has an assigned parking space and has not had some problems with it must be rare indeed; plaintiff's account of that incident is more

[*] 555 F.Supp. 717

incident is more plausible than defendant Blackburn's. Blackburn himself testified the rhubarb over parking played no part in his decision.

Blackburn contended that he had decided not to recommend plaintiff some time back in "the middle" of 1981, twelve or fifteen months earlier. The reasons for not recommending plaintiff, he said, were numerous complaints from lawyers, unsuccessful litigants and co-workers regarding plaintiff's attitude and her conduct in court. I do not believe nor find that those were the genuine reasons. A review of plaintiff's exhibits 9 through 28 shows that all or nearly all the complaints documented by defendant involved events which did not occur until after the mid-1981 time when Blackburn says, he had already decided not to renominate

plaintiff. The earliest such complaint involves a difference with a litigant about interest on a judgment, which took place on the 3rd of July, 1981 (Plaintiff's Exhibit 16). The fact that all but one of the complaints took place after Blackburn says he had made his decision leaves the court with the conclusion -- and I find as a fact -- that those "complaints" had no bearing in his renomination decision.

* * * * *

The magistrate is a judicial officer. The functioning and the integrity of the office are dependent upon the protection of that status. The legislature placed in the Administrative Office of the Courts the authority to designate those records which the magistrate might be required to keep. The clerk's authority is limited to the

supervision of such record keeping; but it does not appear from Chapter 7A-175 of the General Statutes of North Carolina that the Clerk has any authority to require the magistrate to produce any records, or to keep any records not prescribed by the Administrative Office of the Courts.

Regardless, however, of the merits of that particular issue (I find the plaintiff has the better of it), the plaintiff and the public have an interest in plaintiff's exercise of free speech, including access to judicial, legislative, administrative and political figures, to seek information and help on matters affecting the administration of justice. If judges, regardless of their rank, are going to be gagged, it is something that ought not to be left to the private discretion

of the clerk of the court where they serve.

Between the clerk and the magistrate there is no employer-employee relationship, no such "intimate" relationship, no such relationship of "confidence" as to entitle the clerk to deny renomination to a magistrate because she disagrees with his decisions.

The defendant Blackburn is an able public servant, and for nearly a third of a century has been a personal friend of this court. I doubt that he realized he was trampling on anybody's First Amendment rights of free speech or that he was interfering with the functioning of the judicial system which he has spent most of his life ably serving. However, the clerk, like the magistrate, is a public servant, rather than a

private employer or a battlefield commander, and the purpose of free speech is to keep public servants -- even the best of them -- on the straight and narrow. It enables people to express themselves, above all, about the use of power, and to complain about the use or misuse of public power, without the risk of reprisal or punishment. The conduct of the plaintiff was protected by the First Amendment to the United States Constitution.

* * * * *

Mr. Blackburn has complied with the court's December 23, 1982, order that he nominate the plaintiff, Georgia Lewis, for reappointment, and advise Judge Snepp that the recommendation was serious. Today's order will not place any additional obligations upon him

beyond those already [*] imposed by or resulting from previous orders.

Although expectation of continued employment is not necessary to support plaintiff's First Amendment claim, the court finds as a fact that in 1982 plaintiff had a reasonable expectation of reappointment to her post as magistrate. This expectation is based on her three terms of satisfactory service; on her superior qualifications for the job; on her previous three uneventful nominations and appointments; on the seldom-broken custom of reappointing magistrates whose service had been satisfactory; and on the absence of any substantial reason (except her exercise of her constitutional right to speak and seek redress of grievances) why she was

[*] 555 F.Supp. 718

denied renomination. It is also supported by the manner in which Blackburn himself spoke of his role vis a vis the magistrate; his use of the term "fire" on two occasions of record when he was obviously talking about refusing to renominate indicates a view on his part that magistrates presumably will continue to be reappointed unless good cause to the contrary is shown.

* * * * *

THE CASE AS TO THE DEFENDANT SNEPP

Judge Frank W. Snepp, Jr., the additional defendant, was made a party to the case by order dated December 30, 1982. He filed answer and, by agreement of counsel, the case was heard on the merits and is being decided finally on the merits as to Judge Snepp as well as to Mr. Blackburn.

On December 28, 1982, the defendant Blackburn made the nomination required by this court in the form of his December 28, 1982, letter to Judge Snepp.

On December 28, 1982, Judge Snepp wrote a letter to defendant Blackburn which included the following statements:

> "Although it is my general policy to reappoint magistrates who have rendered satisfactory service, in order to give some assurance of tenure, I am deeply and sincerely opposed to unwarranted intrusion upon the legitimate responsibilities and duties of a state judge by federal courts. I regard the language used in Judge McMillan's order, as well a the dictation as to whom you could recommend as a second nomonee [sic], as such an intrusion."
>
> "I therefore decline as a matter of principle to reappoint Ms. Lewis."

Judge Snepp appointed in place of the plaintiff Gerald L. Frederick, who was the alternate nominated by defendant Blackburn.

Plaintiff then moved for an order making Judge Snepp a party defendant and directing defendant Blackburn not to swear in Mr. Frederick for the job which plaintiff had been holding; this was done by order of December 30, 1982, accompanied by a Memorandum of Decision which is of record. The job remains vacant pending final decision in this case.

No relief has heretofore been ordered against Judge Snepp; he was not a party to the proceedings before the December 30, 1982, order was entered.

The January 10, 1983, testimony of Judge Snepp, some 44 pages in length, makes it clear that he declined to reappoint Ms. Lewis because she had exercised her rights under the First Amendment to the United States Constitution by speaking out, to her

supervisor Judge Saunders and to Judge Snepp and others, in opposition to the defendant Blackburn's order regarding microfilm copies of case files.

Excerpts from the testimony of the defendant Snepp are as follows:

(a) The custom since the magistrate system was set up in this district was that the clerk would forward his recommendations to the appointing judge in pairs, two nominees for each job, and that the person in the left hand column with an asterisk by his or her name would be understood as the clerk's recommendation for the job (January 10, 1983, hearing, p. 9).

(b) The defendant Snepp had never requested additional nominees (p. 12). [*]

[*] 555 F.Supp. 719

(c) When defendant Blackburn's written recommendations reached Judge Snepp on December 28, 1982, he "had long ago determined I would not reappoint the plaintiff" (p. 12).

(d) "My authority under the North Carolina Constitution and the North Carolina statutes to appoint or not to appoint is absolute ..." (p. 13) (emphasis added).

(e) Judge Snepp did not interview any of the twenty-one second-line nominees except Mr. Frederick (p. 21).

(f) Reappointment of any incumbent is viewed by Judge Snepp "only as a matter of grace" (p. 21).

(g) In the last two sets of biennial recommendations, he has reappointed incumbents forty-one out of forty-two times (p. 23).

(h) Ms. Lewis has not brought any "public disrepute on the system by her behavior" (p. 24).

(i) "...as an ordinary thing I am not going to clean house, I am going to reappoint incumbents unless in my judgment I should not" (p. 24).

(j) The defendant was "offended" by the inquiry the plaintiff made of him in September as to whether she was required to do the extra clerical work (p. 26). She should have discussed it "with the Clerk and not with other persons in the justice system" (p. 26). [Not even her supervisor, Judge Saunders.]

(k) After his first conversation in July, 1982 with Ms. Lewis, he formed the opinion that she was a "malcontent" (p. 27).

(l) When he received Mr. Blackburn's letter of September 8, 1982, indicating that he was not going to recommend Ms. Lewis for reappointment, Judge Snepp "would not have appointed her" at any time thereafter (p. 37).

(m) "I would not have reappointed her because I do feel that she is a malcontent; I feel that she has a somewhat exaggerated idea of the dignity of her position and I feel that her refusal to follow the directive of the Clerk was detrimental to the administration of the Magistrate system" (p. 43).

(n) "I wouldn't say that more clerks aren't needed. Everybody knows that we do not have enough personnel, especially at this time when hiring has been frozen in the Clerk's office,..." (p. 44).

(o) "COURT: Do you think the First Amendment to the Constitution has any relationship to the case?"

"A. No, sir. I think that under Roth the only time that that would be pertinent would be if there were evidence of a pattern of discrimination in appointments by the appointing authority, based on race or sex" (p. 45).

In his letter of December 28, 1982, Judge Snepp has said that he refused to reappoint the plaintiff "as a matter of principle" because of the fact that she had gone to federal court and got an order which attempts to protect her First Amendment rights. In his testimony on January 10, 1983 (p. 37), he said that he had formed the opinion at least as early as September 8, 1982, three and one-half months before the

appointment deadline, that he would not appoint Ms. Lewis because she was a "malcontent." On this record, both rationales add up to the same thing: Magistrates in Mecklenburg County, although judicial officers of the district court, should be seen and not heard, and reprisals are in store for any magistrate who complains or seeks change, or who files suit in federal court to vindicate constitutional rights.

Ms. Lewis's original inquiry and complaint about the additional microfilm duties were made strictly through "channels"; the first person to whom she spoke about it was Judge Chase Saunders, the Chief District Judge, who was her supervisor.

It was Judge Saunders, plaintiff's supervisor, who suggested to plaintiff

that she speak to Judge Snepp, and to Senator Parks Helms and Representative Louise Brennan about getting some relief through legislative channels.

Defendant Blackburn, in his September 8, 1982, letter notifying plaintiff that she would not be nominated, and in his testimony at the November 22, 1982, hearing (Tr., [*] p. 56, lines 6-9), said that the additional microfilming duties imposed on the magistrate were the result of a mid-1982 amendment to the Record Keeping Manual "requiring this information" (emphasis added). The amendment to the manual (Plaintiff's Exhibit 48, pages 142, 144) makes no such "requirement," and does not even seem to support such a contention. The testimony of defendant that the microfilming duty was

justified by vague, after-the-fact conversations with people in the Administrative Office of the Courts is not persuasive. The case, however, does not turn on who was right in that dispute; if free speech means anything it must include the freedom to be honestly mistaken.

* * * * *

Reinstating plaintiff will not inconvenience anyone else. At the January 10, 1983, hearing there was testimony by Judge Snepp that present Chief Judge Lanning had refused to administer the oath at New Year's to one of the twenty magistrate appointees, because of adverse information of which Judge Snepp had been unaware. Judge Snepp, at the hearing, indicated general agreement with Judge Lanning's decision. That leaves not one but two vacancies among

the magistrates. There is thus no impediment of even a technical or an emotional nature to the immediate reappointment of Ms. Lewis.

* * * * *

CONCLUSIONS OF LAW

1. A state judge, as a judicial officer and as a public official, is bound by the United States Constitution.

Article VI of the Constitution of the United States (the "supremacy clause") provides in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Emphasis added.)

42 U.S.C. Section 1983 provides:

Civil action for deprivation of rights.

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. The First Amendment is also part of that "supreme Law of the Land" by which all public officials, including judges, are bound.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. The First Amendment is probably the most important part of the Bill of Rights. It allows citizens, whether government employees or others, to criticize the government and to complain

if bureaucrats, including judges, fail to do their jobs correctly or do anything oppressive or unlawful. Unless the individual who sees or feels the hand of power used unlawfully is free to complain about it and to criticize it, our system of checks and balances cannot work. The right to criticize government and government agencies and the right to petition other government agencies or agents for redress of grievances is indispensable if the system is to work, if the powers of government are to be kept separate, and if we are to keep the government off the backs of people.

4. The First Amendment protects both Judge Snepp in his criticism of federal judges and the plaintiff in her criticism of the defendant Blackburn and in her approach to other authorities to try to get a [*] redress or adjustment

of her grievance. It is not necessary for the success of Ms. Lewis's First Amendment claim that she be correct (as I think she was) in her view that defendant Blackburn was requiring her to do things that a magistrate should not have to do. Free speech embraces speech that is erroneous as well as speech that is correct, at least in the absence of facts not present in this record.

5. This court has found as fact, and concludes as a matter of law, that Ms. Lewis had a legitimate expectation of renomination and reappointment. It makes no difference, however, whether or not plaintiff had such a legitimate expectation. Perry v. Sindermann, 408 U.S. 593 (1972) squarely holds that the existence of a "property interest" is not necessary to support a claim of violation of the First Amendment. 408

U.S. at 596, 599. Defendants' reliance on Board of Regents v. Roth, 408 U.S. 564 (1972) is misplaced. Roth required showing of such an interest in order to measure the scope of "what process was due"; though First Amendment Claims had been alleged, there were no First Amendment questions before the Supreme Court when its decision was made. 408 U.S. at 574. See Shelton v. Tucker, 364 U.S. 479 (1960) and Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) (non-tenured teacher can establish claim for reinstatement where a board's decision not to rehire is based on a teacher's exercise of a protected First Amendment Right).

> "For at least a quarter-century, this Court had made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.

> It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if a government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible." Perry v. Sindermann, 408 U.S. at 597.

6. Although defendant has the discretion to decide whom to appoint as magistrate from among the names submitted by the clerk of court, that discretion cannot be exercised to violate the First Amendment rights of the plaintiff. Normally, a court will not interfere with the judgments or acts that are committed to another officer's discretion. But the court will fashion an appropriate remedy, including

affirmative relief, where an officer exceeds the scope of his discretion by violating the law or acting in excess of his authority. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court says:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."
>
> "In the 3d vol. of his Commentaries (p. 23), Blackstone states two cases in which a remedy is afforded by mere operation of law. 'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.' And afterwards (p. 109, of the same vol.), he says, 'I am next to consider such injuries as are cognisable by the courts of the common law. And herein I shall, for the present, only remark, that all possible injuries whatsoever, [*]

[*] 555 F.Supp. 722

> that did not fall within the exclusive cognisance of either the ecclesiactical, military or maritime tribunals are, for that very reason, within the cognisance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'"
>
> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

5 U.S. (1 Cranch) at 162-63.

The Court held in Marbury that mandamus (an affirmative order from a lower court) was the appropriate remedy to require Secretary of State Madison to deliver a commission to William Marbury, who had been appointed as justice of the peace by former President John Adams.

7. Examples of relief provided by courts where public officers in exercising their "discretion" have

violated the First Amendment rights of individuals include: Pickering v. Board of Education, 391 U.S. 563 (1968) (the Supreme Court held that a teacher's exercise of his right to speak on issues of public importance could not furnish the basis of dismissal from public employment; accordingly, the Court reversed the decision of the Illinois Supreme Court upholding the dismissal and remanded the case for proceedings consistent with that holding); Visser v. Magnarelli, 530 F.Supp. 1165 (N.D.N.Y. 1982) (District Court held that the Common Council could not refuse to reelect plaintiff to his position as city clerk because of his political affiliation; the court ordered the plaintiff retained as city clerk until the Common Council held an election in accord with the principles of the First

Amendment); benShalom v. Secretary of the Army, 489 F.Supp. 964 (E.D. Wis. 1980) (the District Court ordered reinstatement, with full privileges earned prior to discharge, of a woman who was honorably discharged from the military because of her sexual preferences; the Court noted the need to give the military the "widest possible latitude" in personnel decisions but found that reinstatement was the relief to which plaintiff was entitled); Murray v. Vaughn, 300 F.Supp. 688 (D. R.I. 1969), Murray v. Blatchford, 307 F.Supp. 1038 (D. R.I. 1969) (the District Court declared that plaintiff's First Amendment rights were violated by expulsion from the Peace Corps for publishing a letter critical of United States foreign policy; among other things, the Court ordered expungement of

plaintiff's employment record, recomputation of a reassignment allowance, reclassification of the plaintiff as a II-A in the Selective Service, and cancellation of the induction notice). Other relief awarded where officials have overstepped the bounds of their discretion include: Johnson v. Reed, 609 F.2d 784 (5th Cir. 1980) (the Appeals Court upheld the District Court's decision that consideration of plaintiff for promotion based on incorrect and incomplete records was arbitrary and capricious; the Fifth Circuit also upheld the relief ordered of reinstatement, correction of the promotion records, $10,000 in damages, and requiring that the selection board meet within a specified time to reconsider the plaintiff for promotion); Sanders v. United States,

594 F.2d 804 (Ct. Cl. 1979) (the court held that failure to void passovers for promotion which arose from defective reports was arbitrary and capricious; the court granted plaintiff's motion for summary judgment and ordered back pay, reinstatement, removal of records of passovers, and placement of a nonprejudicial explanation in the personnel record).

Defendants cite no authority that supports the proposition that discretionary acts are not reviewable when performed in a fashion that violates the Constitution. The cases cited involved either no allegations of violations of constitutional or statutory rights, or insufficient proof of such violations. Kiem v. United States, 177 U.S. 290 (1900); Evans v. Watertown, 417 F.Supp. 908 (D. Mass.

1976); and Field v. Boyle, 503 F.2d 774 (7th Cir. 1974). The case of Jones v. Hopper, 410 F.2d 1323 (10 Cir. 1969), cert. denied, 397 U.S. 991 (1970) is of course no longer good law since Perry v. Sindermann, 408 U.S. 593 (1972), supra.

8. The fact that the defendant Snepp is a judge does not exempt him from the legal duty to exercise his discretion within the bounds of the Constitution. In appointing magistrates, the defendant is fulfilling a ministerial, as opposed to a judicial duty. There is no judicial immunity in the performance of ministerial duties. McCray v. State of Maryland, 456 F.2d 1, 4 n. 7 (4th Cir. 1972); Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 736

(1980) (members of Supreme Court of Virginia held liable individually in their "enforcement" capacities). The factors which determine whether an act of a judge is judicial or ministerial relate to the nature of the act itself, not to the identity or title of the actor. Stump v. Sparkman, 435 U.S. 349, 362 (1978); Ex Parte Virginia, 100 U.S. 339, 348 (1879) (Supreme Court upheld Act of Congress as constitutional which provided penalties for state court judges who selected juries so as to exclude blacks; selection of jurors by judges is a ministerial act because the duty could be performed by private persons or other officials).

Appointment of magistrates and other judges is ministerial; it is not required to be done by judges; it is a power to select that in North Carolina

is vested variously in governors, district bar organizations, judges, local governing boards, local officials, and the electorate. The act of appointing to office is not a judicial duty. Judicial duties are primarily acts necessary in the hearing and decision of cases or controversies.

9. Even if the act of appointment were considered a "judicial" duty, judicial immunity protects a judge only from money damages, and not from injunctive or declaratory relief. Timmerman v. Brown, 528 F.2d 811, 814 (4th Cir. 1975); Fowler v. Alexander, 478 F.2d 694, 696 (4th Cir. 1973). Other circuits follow this approach; for example, Heimbach v. Village of Lyons, 597 F.2d 347 (2d Cir. 1979); Harris v. Harvey, 605 F.2d 330, 335 n. 7 (7th Cir. 1979), cert. denied, 445 U.S. 938

(1980); Shipp v. Todd, 568 F.2d 133, 134 (9th Cir. 1978). In Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), the Supreme Court said that "we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts." 446 U.S. at 735 (emphasis added). (The court declined to decide the issue in that case because the judges could be held liable in their enforcement, as opposed to judicial, capacities).

10. Defendants have cited no authority for the proposition that judicial immunity bars the requested relief. At the hearing on January 10, 1983, defense counsel made oral reference to C.J.S., "Judges" Section 86 and cases cited therein, with no helpful direction to this court. The cases

cited by defendant Blackburn in his motion to dismiss, in fact support the proposition that judicial discretion is subject to mandamus where it is abused or used contrary to law. In Ponder v. Joslin, 262 N.C. 496, 504, 138 S.E.2d 143, 149 (1964), the North Carolina Supreme Court said: "It is well settled law that mandamus cannot be invoked to control the exercise of discretion of a board, officer or court when the act complained of is judicial or quasi judicial, unless it clearly appears that there has been an abuse of discretion" (emphasis added). In General Electric Company v. Turner, 275 N.C. 493, 497, 168 S.E. 2d 385, 388 (1969), the court held that the state officer's discretion could not be interfered with because there was no evidence that the "state officers acted either corruptly, or in

violation of the law, or in excess of authority" (emphasis added).

11. Defendant Blackburn's refusal to renominate plaintiff was a violation of her First Amendment rights. However, he has now done all the court has required of him [*] to correct the situation; he has not been the cause of actual money damages to plaintiff; it would appear, on the present record at least, that no further relief is sought of him except costs and attorney's fees, which plaintiff is entitled to recover.

12. Defendant Snepp's refusal to reappoint plaintiff was a violation of her First Amendment rights. He should be required to correct that violation, and to pay costs and attorney's fees.

* * * * *

[*] 555 F.Supp. 724

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That defendant Frank W. Snepp, Jr. is ORDERED AND DIRECTED to reappoint plaintiff, at once, for a current two-year term in her former position as magistrate for Mecklenburg County, North Carolina.

2. That both defendants are liable to pay costs and attorney's fees, which will be assessed and apportioned later.

This 13 day of January, 1983.

James B. McMillan
James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-565-M

GEORGIA J. LEWIS, Plaintiff,	)	
v.	)	SUPPLEMENTAL FINDINGS OF FACT
R. MAX BLACKBURN, Original Defendant,	)	(Filed 1-24-83)
and	)	
FRANK W. SNEPP, JR., Additional Defendant.	)	

Plaintiff has made a motion that the court make additional findings of fact as to the defendant Snepp.

This court's order was entered on the afternoon of Thursday, January 13, 1983.

The next morning, Friday, January 14, 1983, defendants filed notice of appeal to this Fourth Circuit Court of Appeals.

On January 21, 1983, plaintiff filed this motion requesting additional findings of fact.

Normally, the filing of a notice of appeal ousts the jurisdiction of the trial court

However, "a quick filing of notice of appeal by one party" does not "defeat the adverse party's right to have the district court consider the merits of a timely filed motion under Rule 52(b)." Eigen Manufacturing Corporation v. Ventfabrics, Inc., 314 F.2d 440, 444 (7th Cir. 1963). North Carolina practice appears to be in accord. Parrish v. Cole, 248 S.E.2d 878, 38 N.C.App. 691 (1978). The purpose of a Rule 52(b) motion is "to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court." Charles

Alan Wright, Law of Federal Courts, Section 96, at 478 (3rd Ed. 1976). The "ten-day grace period [provided by Rule 52(b)] is unlikely to disrupt the appellate process," and the additional findings "will provide the appellate court with a better understanding of the trial court's decision, thus promoting the judicial process." Parrish v. Cole, supra, at 880.

What the plaintiff requests in her motion is that the court rephrase certain findings of fact so that what is obviously implicit from those findings is made more clearly explicit.

I do not see that the rephrasing is necessary, because the conclusion plaintiff seeks is what the court has already found, and it is obvious from the order as entered. Specifically, for

example, page 11, next to last paragraph, reads as follows:

> The January 10, 1983, testimony of Judge Snepp, some 44 pages in length, makes it clear that he declined to reappoint Ms. Lewis because she had exercised her rights under the First Amendment to the United States Constitution by speaking out, to her supervisor Judge Saunders and to Judge Snepp and others, in opposition to the defendant Blackburn's order regarding microfilm copies of case files.

However, it is better to be redundant than to leave a doubt.

I therefore expressly find as facts that the defendant Judge Snepp declined to reappoint plaintiff Lewis because she had exercised her right under the First Amendment to the United States Constitution by speaking out to her supervisor, Judge Saunders, and to Judge Snepp and others in opposition to defendant Blackburn's order regarding microfilming copies of case files (see

January 13, 1983 order, page 11); that defendant Snepp's opinion that plaintiff was a "malcontent" with a "somewhat inflated idea of the dignity of her office" was based on plaintiff's complaints regarding [*] the microfilming; and that but for those complaints she would have been routinely reappointed.

The court further finds as a fact that if the plaintiff had not made her complaints about microfilming, including the complaint filed in federal court, the defendant Snepp would have reappointed plaintiff to her position as magistrate.

This 24 day of January, 1983.

James B. McMillan
James B. McMillan
United States District Judge

[*] 555 F.Supp. 725

RECEIVED
CHARLOTTE, N.C.
MAY 17, 1985
U.S. DISTRICT COURT
W. DIST. OF N.C.

FILED
APRIL 24, 1985
U.S. COURT OF
APPEALS
FOURTH CIRCUIT

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT
No. 83-1041

GEORGIA J. LEWIS, Appellee,

v.

R. MAX BLACKBURN, Defendant,
and
FRANK W. SNEPP, Appellant.

NORTH CAROLINA CIVIL
LIBERTIES UNION, Amicus Curiae.

Appeal from the United States District Court for the Western District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court

that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Western District of North Carolina, at Charlotte, for further proceedings consistent with the opinion filed herewith.

John M. Greacen
Clerk

EXTRACTS FROM TRIAL TRANSCRIPTS

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-85-565-M

GEORGIA J. LEWIS, Plaintiff,	)	TRANSCRIPT
-vs-	)	OF
	)	PROCEEDINGS
R. MAX BLACKBURN, Defendant.	)	11/22/82

[From Page 10, Line 25 through
Page 19, Line 25]

Petitioner testified
on direct examination:

Q Ms. Lewis, if you will, look in the book in front of you and open it to Page 1, which is Plaintiff's Exhibit 1, and tell me what Plaintiff's Exhibit 1 is, please.

A This is a letter I got from Max Blackburn around September 8.

Q And does it say in the body of it, "While the volume of work that we have in the court system may become

burdensome at times it is incumbent on all of us to understand our responsibilities and cooperate fully to be assured of an effective and efficient administration of justice. Since you have had difficulty in working with departments with important responsibilities and have refused to keep records as prescribed by the "Record Keeping Manual", I cannot consider nominating you to the office of Magistrate for another term." Is that what it says?

A Yes, it does.

Q When you received this letter, Plaintiff's Exhibit 1, did you have some idea of what Mr. Blackburn was referring to by saying that you'd had difficulty in working with

departments with important responsibilities?

A I thought I did.

Q Tell us what you thought was involved there.

A Well, I'd had some difficulty with one of the docketing clerks in getting her to record my judgments as I had them typed.

Q What was her name?

A LaWanda Saunders.

MR. DALY: Your Honor, if you please, I think that's a point we can best handle in the affidavit. Ms. Saunders has executed an affidavit, and I think the simplest way is for me to present to you the plaintiff's affidavit in response and just do that at a later point in connection with their defense, if that is all right.

COURT: All right.

Q Ms. Lewis, the letter goes on to say, to allege that you refused to keep records as prescribed by the Record Keeping Manual. When you received the letter, did you have an idea about what that allegation referred to?

A No, I didn't. I didn't know what the Record Keeping Manual was.

Q Do you now know what the Record Keeping Manual is?

A Yes, I do.

Q What is it?

A It's a printed book that comes out of the office of the, the Administrative Office of the Courts.

Q Did you think that Mr. Blackburn was referring to the matter of some

microfilming when he wrote this sentence?

A Yes.

Q In that connection, please look at Plaintiff's Exhibit 2, which is a July 13, 1982, letter from Mr. Blackburn to you regarding the subject of microfilming. Does that Plaintiff's Exhibit 2 direct you to start microfilming the complaint, the process, the judgment and all other orders and documents signed by you, effective immediately?

A Yes, it does.

Q When you received this Plaintiff's Exhibit 2, did you receive it about the date it's dated?

A Yes, thereabouts, as far as I know.

Q When you received it, what was your practice at that time about what you microfilmed?

A We typed our judgments and microfilmed only our judgments or the dismissal, whichever.

Q When you received Plaintiff's Exhibit 2 regarding the microfilming, did you at that time happen to have an extra caseload?

A Yes, I did.

Q How did that come about?

A One of the Magistrates was on vacation that week before, and the other Magistrate was on duty training one of the criminal Magistrates, so I was pretty much working by myself.

Q Had you been working overtime for the last several weeks?

A Yes, I had.

Q Tell us quantitatively to what hours you had been working.

A Well, I know for sure that week before I didn't get to go home before 6, and I stayed as late as 8.

Q When you received this memorandum, Plaintiff's Exhibit 2, approximately how many cases did you have there on your desk that required your clerical attention?

A There were several hundred.

Q How many cases a year do the three trial Magistrates together handle?

A 22,000 approximately.

Q Do you have any clerical help under your own supervision?

A No, we do not.

Q Who does the typing that needs to be done for you?

A We do our own typing.

Q Have you since begun to obey Plaintiff's Exhibit 2?

A Yes, I have.

Q And have you made some determination about how much time it adds to your average working day?

A I would say it would average out -- we don't do it every day. It would average from a half-hour to an hour.

Q Thank you. What do you understand Mr. Blackburn's authority over you to be, other than his authority to renominate or not renominate you?

A He gives us clerical work as prescribed by the Administrative Office of the Courts.

MR. DALY: If Your Honor will look at Plaintiff's Exhibit 3, that is a quotation of General Statute 7A-175.

Q Ms. Lewis, other than General Statute 7A-175, do you know of any statutory authority that the Clerk has over the Magistrates?

A No, I don't.

Q Is there someone down in the courthouse who acts as the supervisor of the Magistrates?

A Yes, there is.

Q Who is that?

A That is the Chief District Court Judge.

Q At the time you got the memorandum, Plaintiff's Exhibit 2, about the microfilming, who held that office?

A Chief Judge Chase Saunders.

Q What did you do after you received that Plaintiff's Exhibit 2, the memorandum about microfilming?

A I went to talk to Judge Saunders.

Q What was your conversation with him?

A I told him we had gotten a memo asking, directing us to do the microfilming of the entire case and that I was bogged down at that particular point, that I just didn't have the time, and I wondered if there was anything that could be done to help us, relieve us of this.

Q What was the remainder of that conversation, please?

A Well, he said he would confer with Judge Snepp and that he would get back to me.

Q And is that Judge Frank Snepp, the Senior Resident Superior Court Judge in this county?

A Yes, it is.

Q Did you confer with anybody else after receiving Plaintiff's Exhibit 2?

A Later I did.

Q With whom?

A With Parks Helms, who is Chairman of the Courts Commission, and Louise Brennan.

Q What was your occasion for conferring with them?

A Well, when Judge Saunders did get back to me, he suggested that one possibility would be to talk to them and get another clerical clerk in to help us with the microfilming. So I talked to them concerning this.

Q Did you talk with anybody else?

A Not, well, the other, I mentioned it to the other Magistrates.

Q Did you talk to Judge Snepp?

A Oh, yes, I did.

Q When did you talk to Judge Snepp?

A One evening shortly after getting this, I don't remember.

Q About what time of the evening did you talk to him?

A It was approximately 6 o'clock.

Q What was your occasion for speaking with him?

A He was walking down the hall one evening, and I was sitting there working, and I asked him to come into the courtroom.

Q What did you say to him?

A I told him basically the same thing that I told Judge Saunders, that we had received the memo. I showed him the memo, and I showed him the cases as they were piled up on my

desk and in my room, and I asked him if anything could be done to help relieve us of this situation.

Q Was there anyone with him at that time?

A Yes, there was.

Q Who was that?

A A gentleman from the Administrative Office of the Courts.

Q You said earlier that you had also spoken to your fellow trial Magistrates. What did you say to them?

A I just told them that I had spoken to Judge Saunders and that would they hold off until we got something back from him as to whether we had to do the microfilming.

Q You consider Judge Saunders your main supervisor?

A Yes.

Q Did you again talk with Judge Saunders about this matter?

A Yes, I did.

Q What was that conversation?

A He said that he had conferred with Judge Snepp and it appeared that Max [Blackburn] did have a right to tell us to do the microfilming, that it appeared from the statutes that that's what it was.

Q What did you then do about the microfilming?

A I started, well, I had been microfilming all along. I started microfilming the other processes in the...

Q You started doing the additional matters that the memorandum called for?

A Right.

Q How much time elapsed from your receipt of the memorandum, Plaintiff's Exhibit 2, and the time you complied with it?

A Approximately two working weeks.

Q Going back to Exhibit 1, which you believe had something to do with the microfilm matter, after you received Exhibit 1, this notice that you would not be renominated, did you go and talk to Mr. Blackburn?

A Yes, I did.

Q Was it the same day or later?

A It was the same day.

Q What was your conversation with him?

A I told him that I was a good Magistrate and competent and I was fair and I just didn't understand getting this memo from him.

Q What did he say?

COURT: Which memo are you talking about, Exhibit 1?

Q You're talking about Plaintiff's Exhibit 1?

A Yes.

Q Go ahead and relate Mr. Blackburn's conversation.

A Well, he mentioned the microfilming, that I had refused to microfilm, and I explained to him that I had not refused to microfilm, that I had been microfilming at that point for a long time, and then he said, well, he said he wouldn't have me going to Judge Snepp and talking and Max having to answer to Judge Snepp over something he had told me to do, and I explained to him the circumstances in talking to Judge

Snepp, and then he said, well, that I had gone to talk to Tom Ray about some parking, to put something about how Marshall, and then as the conversation went on, that I had gone to the legislators and talked to them.

Q Did Mr. Blackburn say that you had gone to the legislators and talked to them?

A Right, and he mentioned Marilyn Bissell, whom I had not talked to concerning this.

Q Who were the legislators he mentioned that you had talked to?

A Parks Helms and Louise Brennan. I may have brought up Louise Brennan's name. I'm not sure about that. Anyway, he said the legislators.

Q What else was said in that conversation?

A He mentioned LeWanda.

Q LaWanda is the judgment docketing clerk?

A Yes, and he said she had brought a stack of cases this big in that she couldn't docket. I explained to him those judgments, if I had done them the way she had asked me to do they would have been incorrect and...

Q What else was mentioned in that conversation? Did he mention anything about his authority over employment matters?

A When I said -- again, I told him, I said I'm doing a good job, and I'm competent. I went over this again. I said I understand the law, and I says I've had training

in it, and I can't understand what's happening and why you're doing this. He said I can hire and fire who I please, whatever the reason.

****

[From Page 24, Line 3, through Page 24, Line 25]

Petitioner testified on cross-examination:

Q When you first took the position as Trial Court Magistrate, were you then told that you would be required to microfilm certain documents?

A Yes, I was.

Q Did you abide by that order or recommendation to you?

A Yes, I did.

Q So when you were training to be a Magistrate, you knew you had to do your own typing?

A Yes.

Q And you had to microfilm the judgments?

A Yes.

Q But you didn't refuse to do that at that time, did you?

A No.

Q Ms. Lewis, isn't it true when you first became a Trial Court Magistrate that you went to Mr. Blackburn and requested an office clerk to do your typing and filming?

A That is absolutely not true. Jim O'Boyle did but I did not. I wouldn't even want one.

Q Ms. Lewis, don't you resent having to do a menial job like typing and microfilming?

A No, I don't. I don't mind typing my judgments. I prefer to type my

judgments so they will be correct but, no, I don't like to microfilm.

****

[From Page 25, Line 21, through Page 26, Line 3]

Q You did not begin microfilming the additional documents immediately upon receiving the memorandum from Mr. Blackburn's office?

A That was my testimony.

Q And yet you say that the reason you didn't is because you had too much work to do, not because you didn't believe in his authority.

A It was both.

****

[From Page 26, Line 20 through Page 29, Line 6]

Q Did you go to the Administrative Office of the Courts to question Mr. Blackburn's authority, pursuant to that memorandum?

A No, I went to my supervisor.

Q Did you go to Mr. Blackburn to question his authority?

A No, I did not.

Q So the two people who were most likely to tell you they had the authority are the two people you didn't go talk to, aren't they?

A I went to talk to my supervisor.

Q Ms. Lewis, isn't it true that the only reason you refused to film the documents is because you just didn't feel like it?

A That is not true.

Q Isn't it true you were just being lazy?

A That is not true.

Q Ms. Lewis, you have testified the reason you went to Louise Brennan and Parks Helms was to request additional clerical help. Doesn't

that infer that you knew it was your duty that you had not been doing?

A Maybe to you.

Q Did you tell Louise Brennan that if you didn't have to do this filming that you would like to have a clerk anyway?

A That is not true.

Q I'm asking you.

A No.

Q Why did you tell Ms. Brennan you needed additional clerical help to do your job when you weren't doing your job?

A We did need it. We needed another clerk to do the microfilming.

Q You weren't doing the microfilming.

A I was doing the microfilming, and I was working until 6, 7, 8 o'clock

to keep up that particular week.

Q That particular week. Then you took two weeks off for vacation?

A Yes, I did. I had my vacation scheduled for the end of June and because Allie Burnette, who is another Magistrate, would be working by herself I canceled my plane reservations for the end of June and changed my vacation schedule so that I would be working that week, also, because Magistrate Davis still was assisting the Criminal Magistrate.

Q Ms. Lewis, one of the objections raised in Mr. Blackburn's letter is that while we all have difficult jobs to do we must do our jobs. Would you not agree with that? Do you think that you are immune from

having to do your job or from doing your job no matter how long it takes you?

A I did my job.

Q But you didn't film according to the memorandum, did you?

A I did immediately after getting word back from Judge Saunders that it appeared from the statutes that I probably had to do it.

Q Ms. Lewis, you had never questioned the Clerk's authority to require you to film judgments, did you?

A Yes, we did. We had questioned it before. The three Magistrates went to Judge Saunders earlier, approximately May of '81, and discussed this, and this was at the instigation of Magistrate Roy Davis, who has stated on many

occasions how he hates to microfilm.

Q Ms. Lewis, isn't it true that what you said in Mr. Blackburn's office on September 8th is that I'm the best Magistrate he's got, I'm the best Magistrate you've got, I know more law than any of the other Magistrates?

A I didn't say it in those words, and I did not say I was the best Magistrate.

****

[From Page 43, Line 14, through Page 43, Line 14]

Honorable Chase Saunders, Petitioner's Supervisor, testified as a witness for Respondent Blackburn as follows:

Q Now, did you have one or more conversations with the plaintiff in this action concerning her duties

and responsibilities with respect to microfilming documents?

A There were some conversations during the summer. She approached me, advising me that there were a number of documents that she was not being required to microfilm, that she had been notified by the Clerk of this responsibility, and it was going to be burdensome. In my conversations with her, to the best of my recollection, she discussed the possibility of not doing it. I advised her that if she didn't do it, as best I recall, that the Clerk did have the authority to renominate and that it might be taken into consideration at that time. She wanted to know what could be done. I suggested that, inasmuch as all policies

emanate from Raleigh, either statutorily or administratively, she contact the members of the General Assembly to see about getting another law. Representative Helms had helped a number of times in the past and could perhaps help, or contact the Institute of Government -- Louise Brennan was the party there assigned to train Magistrates -- and perhaps have them interpret any procedures that were being utilized so that perhaps a re-examination could be made of that policy to accrue to her benefit.

Q Is it a fair statement to say that you indicated to her that the Clerk of Superior Court did have the authority to direct what documents should be microfilmed?

A At that point, I hadn't checked any of the statutes. I assumed that he did because the Clerk, I was aware of, had some administrative responsibilities involving Magistrates with respect to money and with respect to those operations that dovetail with his Clerk's office, his staff, case processing staff, and I assumed that to be the case. I spoke with her later after advising her that I would contact Judge Snepp and the Clerk. I spoke with the Clerk. He showed me the statute. I read it to require it, and when I saw her later -- I'm not certain of the date -- I advised her that in my opinion there wasn't any recourse, that it was just something that had to be done.

Q These conversations were held where, sir?

A I met her, one time I saw her in chambers back of the court I was in, and another time it was catch-as-catch-can. I saw her in the hall on my way to another court.

Q Did she show you a copy of the memorandum directing her to do the extra microfilming?

A I have no recollection about that, other than the fact she acknowledged there had been a request to do that.

Q You don't recall the dates of these conversations, do you?

A No, just during the summer.

Q Judge, what was your working relationship with Mr. Blackburn in reference to the selection of Magistrates for nomination?

A The statute provided that he submitted names in nomination. He afforded me the courtesy of interviewing certain applicants after initial screening by himself, and I would make notes or comments, and thereafter he would draw up his list and submit it to Judge Snepp for Judge Snepp's scrutiny. Judge Snepp, as I recall, would then call in folks and talk with them and afforded me the courtesy of asking me my opinion with respect to folks submitted.

Q Did you and Mr. Blackburn participate in the evaluation of incumbent Magistrates?

A This would be the time of the year when it was occurring. We have done this on one or two occasions in the past where evaluations were

performed, and in those situations I would give him my opinion with respect to how they had performed, how they worked with me and...

Q Have you ever had a conversation with Mr. Blackburn with respect to whether or not he was considering renominating Ms. Lewis as a Magistrate?

A He spoke to me during the summer, the latter part of the summer.

Q 1982?

A 1982, that he was, and I do not recall the exact words. My understanding of the conversation was that he did not intend to renominate her, and I saw that as, I had not interfered with his nominations in the past. I had no authority, as I saw it. I just recall the conversation, and the

next thing I knew is when I saw Magistrate Lewis and she requested the letter and I prepared it.

****

Respondent Clerk Blackburn testified as follows on direct examination:

[From Page 52, Line 17, through Page 52, Line 23]

Q Mr. Blackburn, would you please tell the Court your reasons for not recommending Georgia Lewis for reappointment as a Magistrate?

A Because of the numerous complaints that I received from the general public, members of the Bar and co-workers for her attitude, for the way she conducted herself in court, mostly her attitude and the way she conducted herself as a Magistrate.

****

[From Page 54, Line 20, through
Page 57, Line 23]

Q Mr. Blackburn, is it your contention that Georgia Lewis refused to microfilm documents in accordance with an order authorized and properly issued from your office?

A Is it my understanding?

Q Yes.

A Yes, it's my understanding that she did refuse.

Q When those documents were not being microfilmed by Ms. Lewis, who had to take care of that?

A Clerical help.

MR. DALY: Objection unless he knows.

COURT: Do you know the answer to the question?

A I do. I instructed them to, Judge, the clerical employees of my Civil Courts Department.

Q How did you find out Ms. Lewis was not microfilming the documents?

A Mr. John Adams, the supervisor of my Civil Courts Department, informed me she was not microfilming them.

Q What was your reaction to that, the failure of Ms. Lewis to abide by your order?

A My reaction was that I had already determined months before that that I was not going to renominate her, so I instructed Mr. Adams to continue, as I had instructed him a few days before, to microfilm the documents she was not microfilming.

Q You did not contact Ms. Lewis about the failure?

A No, I did not. I did mention it to Judge Saunders.

Q Mr. Blackburn, do you recall the afternoon of September the 8th when Ms. Lewis came into your office to discuss the reasons for not renominating her?

A Yes, I do.

Q Would you tell the Court what transpired during that meeting?

A Ms. Lewis came into my office. She sat down, put the letter on my desk and wanted me to explain what this is all about. My answer was I thought it was self-explanatory. She proceeded to tell me that she knew she was competent, that she was the best Magistrate that I had and knew she knew more law than any other Magistrate there. We discussed various things, those in

particular, the refusal for microfilming the documents as prescribed by Mr. Freeman, the Director of the Administrative Office of the Courts, where we had received an amendment to the Record Keeping Manual requiring this additional microfilming. We discussed why, if she felt that I did not have the authority to instruct her to microfilm, why she had not contacted me. She first denied that she had even contacted Ms. Louise Brennan. I informed her I would call Ms. Brennan and ask Ms. Brennan why she had told me so. Then she did tell me that she had asked Ms. Brennan. She had called Ms. Brennan with regards to additional help for, to assist in the clerical work. I did not tell

her that she had called Mr. Parks Helms. I told her that Ms. Brennan told me that she, Ms. Brennan, had called Mr. Helms and asked him to give her a clear interpretation of that statute where I do have the authority to require record keeping by Magistrates. I informed her that I had received a call from the Administrative Office of the Courts with regards to the record keeping, that she had stopped Judge Snepp in the hallway and inquired of Judge Snepp of my authority to require her to do additional record keeping and that there was a gentleman with Judge Snepp, which she immediately told me she didn't know the gentleman and didn't know he was with the Administrative Office of the Courts. I told her that that

gentlemen had gone back to the Administrative Office of the Courts, called the record keeping supervisor and told him that I may be having some trouble in Mecklenburg County with the new Record Keeping Revised Manual and specifically said with Ms. Georgia Lewis. Mr. Campon was the gentlemen with Judge Snepp at the time she talked to Judge Snepp. Mr. Jones, who is Legal Counsel for the Administrative Office of the Courts, is the one that called me via Jimmy Glenn. After they called me, I went to Judge Snepp and spoke to Judge Snepp about that. She had initially denied that she had talked to Judge Snepp. I told her Judge Snepp had not told me she had talked to him, that I learned it

through the Administrative Office of the Courts and inquired of him and he did tell me she had talked to him. I informed Judge Snepp that she had refused to microfilm. His response was no one in this system is going to refuse to perform.

Q Mr. Blackburn, did you at any time refuse to nominate Georgia Lewis because she had gone over your head or had spoken to legislators about your July 13th memorandum?

A I certainly did not. She can talk to the legislators any time she pleases.

****

Respondent Clerk Blackburn testified on cross-examination as follows:

[From Page 68, Line 21, through Page 69, Line 8]

Q Mr. Blackburn, prior to the time that you sent Plaintiff's Exhibit 1

to Ms. Lewis, Plaintiff's Exhibit 1 is your September the 8th letter which tells her she won't be reappointed, had you ever before that time expressed to her any dissatisfaction with the way she was carrying out her duties as a Magistrate?

A I had not expressed to her, no. I had gone to Judge Saunders, as he testified this morning, on several occasions.

Q With regard to the complaints that you received from lawyers, court workers and members of the general public, do you know, as a matter of fact, whether there was any substance or merit to any of those complaints?

A I do not know, other than the fact that I referred them all to Judge Saunders.

****

[From Page 75, Line 9, through Page 75, Line 15]

Q So, was it simply the complaints that you had received up to that date that led you to not renominate her?

A I had received numerous complaints at home, in my office, by telephone, constant, Mr. Daly. I told you that before.

Q Were those complaints the reason you decided not to renominate her?

A Yes.

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IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-565-M

GEORGIA LEWIS, Plaintiff,	)	TRANSCRIPT
-vs-	)	OF
	)	PROCEEDINGS
R. MAX BLACKBURN, and FRANK W. SNEPP, JR., Defendants.	)	1-10-83

Respondent Judge Snepp,
called as a witness by
Petitioner, testified as follows:

[From Page 5, Line 6, through
Page 6, Line 18]

Q Judge Snepp, let me call your attention, if I may, to Plaintiff's Exhibit 3, which is your December 28 letter to Mr. Blackburn. At the beginning of that letter you say, "As you are aware, since I have been Senior Resident Superior Court Judge for this District, I have taken an active interest in the selection and appointment of Magistrates." Would you describe

for me, please, what that active interest has consisted of?

A Yes. Before I became Senior Resident Judge, the practice had been that the Senior Resident Judge, upon the appointment of a Magistrate, would confer with the Clerk and with the Chief District Court Judge and whatever their recommendation was, he would follow that. When I became Senior Resident Judge, I announced I would exercise independent judgment in every appointment. I not only go over the personnel records and the resume of the applicant, I talk with the Clerk and with the Chief District Court Judge and I have a brief interview with the applicants especially as I am especially interested that the warrant-issuing

Magistrates have a personality, that they are not milk toast, they can stand up to police officers when the question is whether probably cause has been established or the amount of bail. I try to get a personal appraisal of the person and I have exercised my own judgment and on occasion have gone against the recommendations of the Clerk and the Chief District Court Judge and followed my own judgment in the matter. This is on the matter of original appointments.

Q By original appointment do you mean when a person becomes a Magistrate at a time other than the regular biennial appointments?

A The first time anyone becomes a Magistrate. As to the reappointments, I have generally

followed a practice to reappoint incumbents. However, two years ago I informed the Clerk that if he wished to spare an incumbent Magistrate embarrassment, not to submit his name for a reappointment as I would not reappoint him. He had exercised his constitutional rights of free speech by telling an officer who was attempting to arrest him for driving under the influence that he was a judge and could not be arrested, and then had used some symbolic speech and had to be carried bodily into the Mecklenburg County Jail.

****

[From Page 7, Line 4, through Page 7, Line 17]

Q Do you actively supervise the Magistrates?

A No, I do not. That is the responsibility of the Chief Distict Court Judge. Magistrates are officers of the District Court; officers of the District Court.

Q Do you have any general relationship with the Magistrates other than to appoint and to reappoint them?

A Only through the Clerk and the Chief District Court Judge. I have frequent discussions with the Chief District Court Judge as to the exercise of duty by the Magistrates or anything that comes to my attention that I think should be called to his, such as the setting of disproportionate bonds by Magistrates. I confer with the Chief District Court Judge and he gives me a written report on the

matter as to why the guidelines which we promulgate under the statute had been departed from.

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[From Page 10, Line 2, through Page 12, Line 4]

Q Judge Snepp, on page 2 of Exhibit 3 for this hearing, you state [in your letter of December 28, 1982 to Respondent Clerk Blackburn], "You" - that is Mr. Blackburn - "were ordered by Judge McMillan to use this specific language", the specific language, I believe, being...well, let me ask you about something else. It says on page 2 of that same exhibit, "You" - that is Mr. Blackburn - "were prevented from submitting to me as the other nominee for this position the name of a former Magistrate who, during his service, had proved to be well

qualified himself." Were you referring to Allan Knighten?

A Yes.

Q Do you know of anything that prevented the Clerk from submitting Allan Knighten's name to you?

A Yes, I do. You threatened to bring him into this court and enjoin him from so doing. You filed a motion to that effect, Mr. Daly.

Q Is it your understanding that that motion prevented him from doing it?

A I think it deterred him from doing it. I know he would have liked to nominate Mr. Knighten when it became known that Mr. Knighten was available.

Q Motions don't prevent, do they?

A They deter and they intimidate, I think, in the circumstances of this case.

Q Did you understand that there was every any agreement between me and Mr. Blackburn or just simply that I filed a motion and he was apprehensive about it?

A I think you filed a motion when you found out he was contemplating that and that that deterred him from doing it. He was then under somewhat of a threat of court order in this matter.

Q Is it your understanding that I told him that if he put Mr. Knighten opposite Mrs. Lewis I would contend he was in violation of the court order?

A Yes, sir, and that you personally selected the person whose name should be opposite that of Mrs. Lewis.

Q Did you understand that I told him that if he would put Mr. Frederick opposite Mrs. Lewis that I wouldn't contend he had picked out an unfairly difficult opponent for her?

A Yes, sir.

Q Did you understand that Mr. Blackburn was under any compulsion or threat not to place Mr. Knighten next to any of the other twenty Magistrates?

A I think the facts speak for themselves, Mr. Daly, that he would have liked to have submitted the name to me and he was deterred from doing so by your threat of court order.

Q Is it your understanding that Mr. Knighten did good service when he was a Magistrate?

A It was.

Q And be a competent reappointment?

A Yes.

Q Could Mr. Blackburn, as far as you understand, have placed Mr. Knighten in nomination next to other Magistrates?

A Certainly, had he so desired to do so. I feel that is a matter vested in him in the law in his sole discretion.

****

[From Page 13, Line 5, through Page 14, Line 4]

A Mr. Daly, my opinion and under the opinion of the United States Supreme Court in Board of Regents against Roth, 408 U.S. 564, when under state law the term of an officer is definite, there is no entitlement to reappointment, that the appointing authority vested by

law with the power of appointment in that case is entirely, the action is a matter of discretion, and that in pretty definite language the U.S. Supreme Court told Federal Courts to leave this alone unless there was something established like a pattern of discrimination based on race or sex. In my opinion, my authority under the North Carolina constitution and the North Carolina statutes to appoint or not appoint is absolute and I was not a party to this lawsuit. All the relief which was asked by the plaintiff in this case was that Mr. Blackburn be ordered to nominate her, and I was astounded when I received an order from this court, with all due respect, trying to influence my

decision because I consider as a matter of law that is my decision and it is a matter of unfettered discretion under Federal law.

Q The Roth case holds that Professor Roth didn't have a property interest in the job.

A That is correct, and in this case, in my opinion, there is no property interest. It's a definite term of two years. The office is an officer of the District Court. At the end of two years no incumbent is a Magistrate or has any right to be a Magistrate.

Q Well, if that's the case, then why would it have been proper to have ordered Mr. Blackburn to submit Mrs. Lewis's name?

A Well, that I haven't any opinion. I have an opinion about that that

is not germane to my own situation. I don't think there was any authority to do that, either, and we'll take that up.

Q I'm just wondering about the last paragraph on the first page where you seem to assume that it was okay.

A I say that was the only proper relief under the pleadings. That was all you asked for.

****

[From Page 14, Line 15, through Page 16, Line 24]

Q On the next page [of your December letter to Respondent Clerk Blackburn] you say about half-way down in the fourth paragraph: "since you are ordered by Judge McMillan to use this specific language" - that is, the language about for real and dead serious - "I can only conclude that this

is an attempt to influence if not to coerce me to appoint Mrs. Lewis regardless of my judgment as to whether it would be in the best interest of the Magistrate system to do so." Did you know of any order from Judge McMillan to you at that point?

A No, I just knew of the language in the December 23 order.

Q In fact, there has never been any order issued to you in this case except my subpoena.

A No, but I felt that this was not called for, with all due respect to the Court, and was an insult to my intelligence.

Q Why did you conclude that it was an insult to your intelligence?

A Well, saying that this was for real and that Mr. Blackburn requested me

to make that appointment when I knew from the whole history of this matter that he did not want me to make the appointment, he was not going to recommend Mrs. Lewis, and for him to be ordered to say that he requested me to do it and was in earnest about it seemed to me to be going far beyond what was necessary for him to make the nomination. He has no authority to request me under state law to appoint any individual. That is a matter vested in my discretion as Senior Resident Judge of this District.

Q If you were a judge sitting in equity and you concluded that a defendant had violated the rights of the plaintiff in failing to nominate her for a position and you knew that everybody in town knew

what was going on from reading the papers, would you not have considered formulating some equitable remedy that would have told the appointing authority that he should consider the matter as if the constitutional violation had never happened?

A Not until I heard the case of the appointing authority, with all respect.

Q Even if he was not a proper party at that point and no legal relief was germane.

A In equity they used to say the decision is according to the length of the Chancellor's foot and my foot is not that long.

Q Well, why did you think that this was an attempt to coerce you?

A Because it clearly, in my mind, had the Clerk write me something, to request, that was not his prerogative under the statute to tell me what I knew from common sense was not so, that he wanted her appointed.

Q So in your mind the fact that Mr. Blackburn is opposed to Mrs. Lewis is ineradicable. Is that what you're saying?

A That is certainly a very important consideration. I think she has, by refusing to follow certain reasonable directions, has put herself into a position where she can no longer work in harmony with the Clerk of Superior Court and the Chief District Court Judge and that her reappointment would be bad for the entire Magistrate system for

this county and for the Magistrate system of the entire state.

Q And you didn't like having this Court attempt to influence your judgment, did you?

A No, I did not.

Q Isn't it true that lawyers try to influence your judgment every day?

A Yes, sir, but they realize that I have the final say.

****

[From Page 18, Line 12, through Page 18, Line 16]

Q Do you know of any policy-making function that the Magistrates fulfull?

A No, their function is judicial. They are an officer of the District Court and under the direction of the Chief District Judge as to the day to day operation of their office.

****

[From Page 19, Line 17, through
Page 20, Line 7]

Q Judge Snepp, you say further in that letter: "It is my general policy to reappoint Magistrates who have rendered satisfactory service in order to give some assurance of tenure." What is satisfactory service?

A That they have carried out their duties, that they have not been a disruptive influence, that they have followed the directions of those authorized by law to give them direction, and that they have not engaged in any conduct which brings any disrepute to the system.

Q How do you get hold of the facts to make that decision, that is, whether the Magistrate you're considering, the incumbent you're

considering has rendered satisfactory service?

A I have to rely principally upon the Chief District Court Judge and the Clerk of Court. Also I get input. I hear what lawyers have to say and the general gossip which goes around the courthouse at all times.

****

[From Page 24, Line 23, through Page 27, Line 10]

Q In your Answer at paragraph 6 you say: "Sometime during the summer of 1982 the plaintiff, Mrs. Lewis, complained to you that the Clerk had directed her to peform the microfilming of certain records of her office and stated, in effect, that he had not the right to do so."

A That's right.

Q Tell me all the recollection you have of that conversation, please.

A I was in the company of a member of the staff of the Administrative Office of the Courts, as I recall. We had been to a meeting, I think in connection with American University Study, in some other business in the governmental plaza. We were coming back through the second floor to the elevator. Mrs. Lewis stopped me in the hallway and complained that Mr. Blackburn was having her perform clerical work, that she wasn't supposed to perform clerical work, that she had had to stay there after five o'clock on some occasions.

Q Do you recall anything else?

A That was the sum and substance of it.

Q You say in your answer that she stated, in effect, that he didn't have the right to do so.

A My impression I got from her was she was saying he had no right to do this, that this was not one of the duties of her office.

Q But you don't recall her saying those specific words?

A No, I don't recall her specific words but that was the clear import, that he was doing something he was not authorized to do. I immediately went back on the next day because, in the first place, the person I was with, Mr. Canton from the Administrative Office, was cognizant of the policies of the Administrative Office of the

Courts. As I recall, he that afternoon assured me that that had been approved by the Administrative Office. I found out there was statutory authority for the Clerk to do this and that it was quite within Mr. Blackburn's powers to have the clerks perform clerical functions and I knew we were in a bad way about clerical personnel in the system.

Q Did it offend you that Mrs. Lewis said that the Clerk might have no right to require her to do the microfilming?

A It offended me that she came to me about it at all. It didn't offend me, but I thought it was a little unusual for a Magistrate to be complaining to me about something the Clerk had done when it was a

matter she should discuss with the Clerk and not with other persons in the justice system.

Q Why do you say that?

A Because I think that this was a matter that she was not willing to do, what she had been directed to do, and she was complaining.

Q Is there any written policy over there about who you should complain to?

A No, there is not. It's a matter of common sense.

Q So what bothered you was the fact that she was complaining.

A Yes. I then found she was complaining to other people and doing so publicly. This was getting spread throughout the system. I spoke with Mr. Blackburn and told him that she had

complained to me, that I had looked into it, that he had the statutory authority to do this and I asked him to tell her so.

Q In paragraph 7 you speak of making inquiry about the matter. Is there anything further you did other than what you just testified about?

A No. I satisfied myself that it was perfectly within the authority of the Clerk to require Magistrates to do, to perform clerical functions.

****

[From Page 33, Line 3, through Page 35, Line 4]

Q What's wrong with her talking to public officials about the matter?

A If she's talking to public officials, asking them to provide her by legislation with a clerk, as I understand she wanted when she

first became a Magistrate, that's perfectly all right. When it is a matter affecting the morale and attitude of other members of the Magistrate's Office, then I think it is my concern.

Q What information do you have that that was occurring?

A Because of my information of her talking about the courthouse that the Clerk was making the Magistrates do what he had no authority to make them do.

Q Anything else?

A No.

Q But as far as you say, it was perfectly all right for her to have contacted public representatives about the matter.

A Certainly. If she wants to ask the representatives to provide more

clerks, I'm in favor of it. We're short of clerks all the way around.

Q Well, then, why do you allege in paragraph 9 that there is any problem with her continuing to complain to various public officials?

A Because her complaining was done in the context of the courthouse about what I regard as the perfectly legitimate action of Mr. Blackburn and about him, and she has to work with him and he has to work with her, and I think it came to a point where it made it utterly impossible for there to be compatible cooperation between the plaintiff and Mr. Blackburn.

Q What facts do you have to support that conclusion?

A The facts are my opinion based on what I observed.

Q And did you ever observe the plaintiff other than the one time you had a conversation with her in the hall?

A I don't know what you mean. I see her about.

Q Did you ever observe anything about her that led you to that conclusion that things were getting impossible?

A There have been things before this. I have heard on many occasions prior to this that Mrs. Lewis talked about the courthouse that she wields great political influence.

Q Do you know whether that's a fact or not?

A I know that that has been reported to me.

Q Do you know whether it's a fact or not?

A Whether it's a fact or not, I think she thinks she has this political influence.

Q Why does that have anything to do with anything?

A Because I think it has been used about the courthouse with other people to convey that she doesn't have to quite toe the mark and obey the rules like other people do.

Q Is that your opinion?

A That's my opinion.

Q What facts do you base it on?

A I based it on what I have heard and that is my considered judgment.

****

[From Page 37, Line 5, through
Page 39, Line 7]

Q Judge Snepp, in paragraph 11 you say that after this conversation it was your opinion that the plaintiff was a malcontent.

A That's right.

Q What is a malcontent?

A A malcontent is a person who is dissatisfied with the situation in which they find themselves. Now malcontent can be a fine thing if it leads to constructive action. In my opinion, her malcontention in this case has been destructive of the good administration and the efficient administration of the Magistrate system.

Q Is that the basic reason why you failed to reappoint Mrs. Lewis?

A It is.

Q Is there any other matter which went into your judgment not to reappoint her?

A Yes, indeed. Had I been going to appoint her, after I received the letter from Mr. Blackburn, I would not have appointed her, the letter of December 23 about he requested me to appoint her.

Q One of the reasons you didn't appoint her was because she came down here and filed this suit.

A Because my understanding is that this is a matter of the discretion of the appointing authority and it is not to be questioned.

Q Right. So since she questioned your authority by filing this suit...

A Not since she questioned it, since this Court questioned it.

Q Well, this Court wouldn't have questioned it if she hadn't brought the lawsuit.

A That may be true.

Q Apart from that, was there any other reason beyond what you have already related why you didn't reappoint her?

A No. I did not reappoint Mrs. Lewis because in my judgment, based on everything I know, it was not in the best interest of the Magistrate system of Mecklenburg County to do so, and I consider that my responsibility to make that decision.

Q And you have told us already all the facts and opinions that you have on which you base that decision.

A I think they are not pertinent because under the statute, whether I have any reason or not, and I think under Roth I don't even have to have a reason. But I have tried, in all dealings with the Magistrates, to be a little more rational and base what I do on some reason and, if the basis on which I acted was mistaken, that's all right because it's still, I believe under the statute, vested in my discretion and I acted on the basis of the best information I can obtain.

Q Do you believe that the Clerk failed to reappoint Mrs. Lewis because she exercised her First Amendment rights?

A No, I do not. I think he failed to reappoint her because she was a

burr under his saddle in this system and was detrimental to the operation of the system and her attitude toward her office and her somewhat inflated idea of the dignity of her office.

****

[From Page 41, Line 13, through Page 41, Line 25]

Q In. paragraph 15 [of your Answer] you speak of a December 22 conversation with the Clerk in which the Clerk informed you that the Court had ordered that he submit the plaintiff's name as one of the nominees and write the letter, stating that the nomination was for real and that the Clerk was dead serious.

A Yes.

Q What else occurred in that conversation?

A I got pretty hot and I said, Don't you write me a letter like that. He said, I'm under a court order to do so, and I said, Well, then, obey the court order and I'll do what I have to do.

Q What else did the Clerk say?

A That's all.

****

[From Page 44, Line 3, through Page 46, Line 6]

COURT: The original bone of contention, if I understand it, was that she felt that more clerks were needed and she had raised this question whether the Clerk had been authorized to require that additional clerical work .

A Your Honor, I wouldn't say that more clerks aren't needed. Everybody knows that we do not have enough personnel, especially at

this time when hiring has been frozen in the Clerk's office, but the thing...

COURT: Let me finish my question. She objected to doing clerical work which she said was not authorized by the Administrative Office and, getting nowhere with that, she complained to you and members of the legislature and others. Do you agree with her, from what you said a while ago, that you need more clerks, thereby, I thought, agreeing with the merits of her complaints. If I understand further, you then refused to reappoint her because she had raised a meritorious issue for the improvement of the operation of the court.

A No, sir, I'm sorry, you misunderstood. I did not reappoint her because she continually complained of Mr. Blackburn's action as specific. She had the idea that she should have a personal clerk in her office. Now that's fine if she gets the legislature to provide it. We could all use more clerical personnel. But when she questioned Mr. Blackburn's authority to direct her to make the microfiches of her records and kept talking about his action in doing that, that's when I decided that her reappointment was not in the interest of the Magistrate system regardless of what any regulation said. If that is a person's attitude, that they are going to do just exactly what

they have to do and not make the little extra effort to make the system work, I don't want them in the system.

COURT: Do you think the First Amendment to the Constitution has any relationship to the case?

A No, sir. I think that under Roth the only time that that would be pertinent would be if there were evidence of a pattern of discrimination in appointments by the appointing authority, based on race or sex.

COURT: You don't think the right of free speech enters into this case?

A No, sir, not when the free speech affects the performance in office as, in my opinion, it does in this case.

MR. RICH: Your Honor, I have one question I would like to ask him in view of the Court's questions.

CROSS EXAMINATION BY
RESPONDENT SNEPP'S COUNSEL

Q Did Mr. Blackburn inform you at any time that he had requested additional clerical help for the Magistrates?

A He didn't have to. We have discussed that on many occasions, that we need additional clerical help. Right now we've got a freeze on hiring, even filling vacancies, and we've got a terrible situation about the clerical help.

Q How long has that freeze been in existence?

A Sometime about a year or so. We're very short-handed and everybody's got to do more than they are called upon to do to make this thing work.

****

UNITED STATES CONSTITUTION, Amndt. I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 United States Code Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

NORTH CAROLINA CONSTITUTION, Art. IV Sec. 10:

"The General Assembly shall from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief

Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected. For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint for a term of two years, from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The number of District Judges and Magistrates shall, from time to time, be determined by the General

Assembly. Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law. Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office."

North Carolina General Statutes.

"Sec. 7A-170 Nature of office and oath.

A magistrate is an officer of the district court. Before entering upon the duties of his office, a magistrate shall take the oath of office prescribed for a magistrate of the General Court of Justice. A magistrate possesses all the power of his office at all times during his term. (1965, c.310, s.1; 1969, c. 1190, s. 13; 1977, c. 945, s.2)"

"Sec. 7A-171. Numbers; appointment and terms; vacancies.

(a) The General Assembly shall establish a minimum and a maximum quota of magistrates for each county. In no county shall the minimum quota be less than one.

(b) Not earlier than the Tuesday after the first monday nor later than the third Monday in December of each even-numbered year, the clerk of the superior court shall submit to the senior regular resident superior court judge of his district the names of two (or more if requested by the judge) nominees for each magisterial office in the minimum quota established for the county. Not later than the fourth Monday in December, the senior regular resident superior court judge shall, from the nominations submitted by the clerk of the superior court, appoint magistrates to fill the minimum quota established for each commencing on the first day in January of the calendar year next ensuing the calendar year of appointment."

"Sec. 7A-175. Record to be kept.

A magistrate shall keep such dockets, accounts, and other records, under the general supervision of the clerk of superior court, as may be prescribed by the Administrative Office of the Courts. (1965, c. 310, s. 1)"

"Sec. 7A-210. Small claim action defined.

For purposes of this Article a small claim action is a civil action wherein:

(1) The amount in controversy,

computed in accordance with G.S. 7A-243, does not exceed one thousand dollars ($1,000); and

(2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and

(3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

The seeking of the ancillary remedy of claim and delivery does not prevent an action otherwise qualifying as a small claim action under this Article from so qualifying. (1965, c. 310, s. 1; 1973, c. 1267, s. 1; 1979, c. 144, s. 1; 1981, c. 555, s. 1.)"

"Sec. 7A-211. Small claim actions assignable to magistrates.

In the interest of speedy and convenient determination, the chief district judge may, in his discretion, by specific order or general rule, assign to any magistrate of his district any small claim action pending in his district if the defendant is a resident of the county in which the magistrate resides. If there is more than one defendant, at least one of them must be a bona fide resident of the county in which the magistrate resides. (1965, c. 310, s. 1, 1967, c. 1165.)"

"Sec. 7A-292. Additional powers of magistrates.

In addition to the jurisdiction and powers assigned in this Chapter to the magistrate in civil and criminal actions, each magistrate has the following additional powers:
To administer oaths;

(2) To punish for direct criminal contempt subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina;

(3) When authorized by the chief district judge, to take depositions and examinations before trial;

(4) To issue subpoenas and capiases valid throughout the county;

(5) To take affidavits for the verification of pleadings;

(6) To issue writs of habeas corpus ad testificandum, as provided in G.S. 17-41;

(7) To assign a year's allowance to the surviving spouse and a child's allowance to the children as provided in Chapter 30, Article 4, of the General Statues;

(8) To take acknowledgments of instruments, as provided in G.S. 47-1;

(9) To perform the marriage ceremony, as provided in G.S. 51-1;

(10) To take acknowledgment of a written contract or separation agreement between husband and wife;

(11) Repealed by Session Laws 1973, c. 503, s. 9.

(12) To assess contribution for damages or for work done on a

dam, canal, or ditch, as provided in G.S. 156-15; and

(13) Repealed by Session Laws 1973, c. 503, s. 9.

(1965, c. 310, s. 1; 1967, c. 691, s. 25; 1971, c. 377, s. 17; 1973, c. 503, s. 9; 1977, c. 375, s. 4; 1979, 2nd Sess., c. 1080, s. 6.)"

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No. 85-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGIA J. LEWIS,
Petitioner,

v.

F. MAX BLACKBURN, Clerk, Superior Court, Mecklenburg County, and FRANK W. SNEPP, JR., Senior Resident Superior Court Judge, Mecklenburg County, North Carolina,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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12 pp

QUESTIONS PRESENTED

I. ARE THE CLERICAL DUTIES AND WORKLOAD OF A MAGISTRATE MATTERS OF "PUBLIC CONCERN" WITHIN THE MEANING OF THE FIRST AMENDMENT?

II. SHOULD THIS COURT RE-EXAMINE THE FIRST AMENDMENT RIGHT OF PETITIONER?

III. DID THE COURT OF APPEALS VIOLATE RULE 52(a), FED. R. CIV. P.?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED 3

THE CLERICAL DUTIES AND WORKLOAD OF A MAGISTRATE ARE NOT MATTERS OF PUBLIC CONCERN WITHIN THE MEANING OF THE FIRST AMENDMENT. THIS COURT SHOULD NOT RE-EXAMINE THE RIGHT TO PETITION GUARANTEED BY THE FIRST AMENDMENT. THE COURT OF APPEALS DID NOT VIOLATE RULE 52(a), *FED. R. CIV. P.* ... 3

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF CASES

Anderson v. City of Bessemer, ___ U.S. ___, 53 U.S.L.W. 4314 (1985) 8

Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 720 (1985) ... 4

Jacobellis v. Ohio, 378 U.S. 184, 190 (1963) 8

Lewis v. Blackburn, 734 F.2d 1000 (C.A. 4, 1984) 3

STATUTES

42 U.S.C. 1983 2

28 U.S.C. 1254(1) 1

28 U.S.C. 2101(c) 1

MISCELLANEOUS

Rule 52(a), Federal Rules of Civil Procedure ..... *i*, 6, 7

53 U.S.L.W. 4317 7

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v.

F. MAX BLACKBURN, Clerk, Superior Court, Mecklenburg County, and FRANK W. SNEPP, JR., Senior Resident Superior Court Judge, Mecklenburg County, North Carolina,
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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, *en banc*, in this case (not yet reported), the opinion of the majority of the three judge panel, 734 F.2d 1000, and the dissent to the majority opinion, 734 F.2d 1008, are set forth in the petitioner's Appendix beginning at page 1.

JURISDICTION

The jurisdiction of this Court has been invoked by petitioner pursuant to 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions are set forth in petitioner's Appendix, pp. 219–222.

STATEMENT OF THE CASE

Petitioner Georgia J. Lewis was serving as a magistrate in Mecklenburg County, North Carolina, for a two-year term expiring December 31, 1982. In North Carolina, magistrates are nominated by the Clerk of Superior Court and appointed by the senior resident Superior Court judge from the nominees selected by the Clerk.

In September 1982, respondent R. Max Blackburn, Clerk of Superior Court in Mecklenburg County, notified petitioner that he did not intend to renominate her as a magistrate. She instituted this action against Blackburn as original defendant under 42 U.S.C. § 1983. She alleged that Blackburn was violating her constitutional rights, that he was refusing to renominate her on account of her speech protected under the First Amendment. The case was assigned to the Honorable James B. McMillan. After two hearings, the District Court entered judgment in petitioner's favor, and ordered Blackburn to write a letter to Judge Frank W. Snepp, Jr., senior resident Superior Court judge for Mecklenburg County, stating that the nomination was "for real" and that Blackburn was "dead serious" in making the nomination. The District Court also found Blackburn liable for costs and attorneys fees.

Blackburn complied with the District Court's order, renominated petitioner and another individual for another two-year term as magistrate, and wrote the required letter to Judge Snepp.

On December 28, 1982, Judge Snepp appointed the other individual to petitioner's position as magistrate, and wrote Blackburn a letter explaining his reasons. Petitioner moved for an order making Judge Snepp an additional party defendant, which motion was allowed by the District Court. The District Court further prohibited Blackburn from swearing in the individual appointed by Judge Snepp as magistrate.

After a hearing conducted on January 10, 1983, the District Court entered final judgment on January 13, 1983. The Court found that Judge Snepp had also violated petitioner's First Amendment rights, and ordered him to immediately reappoint petitioner to another term as magistrate.

Blackburn and Snepp gave notice of appeal to the Court of Appeals and Judge Snepp moved the District Court for a stay of its order pending appeal, which was denied. Snepp then petitioned the Court of Appeals for a stay pending appeal which was allowed.

On appeal, the District Court judgment was affirmed by a 2 to 1 decision, *Lewis v. Blackburn,* 734 F.2d 1000 (C.A. 4, 1984). Ervin, J., dissented. 734 F.2d 1008. Rehearing En Banc was allowed and the En Banc Court reversed the District Court judgment. Petitioner's Appendix 1.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE CLERICAL DUTIES AND WORKLOAD OF A MAGISTRATE ARE NOT MATTERS OF PUBLIC CONCERN WITHIN THE MEANING OF THE FIRST AMENDMENT.

Petitioner asks this Court to "settle the analytic framework to be applied" in determining "whether speech

addresses a matter of public conern." Petition, p. 7. In the respondents' view, this question has been settled by this Court.

> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record.

Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 720 (1985).

The dissenting opinion of Ervin, J., which was the basis of the En Banc decision, enunciates the position of the respondents:

> Here, it is beyond dispute that Lewis's complaints began upon learning that she would be assigned additional duties. The record as I view it is unequivocal that the motivation for her complaints was personal effrontery over being asked to do more work, not public-spirited concern over the administration of justice.

Appellant's Appendix, pp. 48-49.

> The seeds of this unseemly controversy can be discovered in Lewis's own deposition in which she admitted that she was not initially aware that Magistrates did their own typing and microfilming of documents. She learned this in the course of her training although she candidly admitted that "I don't like to microfilm."

Appellant's Appendix, p. 50.

> As further evidence that Lewis was interested only in her own personal work load, her testimony reveals that in her opinion the additional

> microfilming required an additional one-half to one hour per day of her time, although she admitted that this was not true "every day." Her displeasure centered on her own overtime work and her inability to leave the office at 5:00 p.m.

Appellant's Appendix, pp. 52–53.

> In short, I think that the sum and substance of Georgia Lewis's complaint was that she had too much work to do and could not absorb additional duties. While I am sympathetic to her grievance, I find in her protest only matters of self-interest rather than issues of public concern.

Appellant's Appendix, p. 57.

II.

THIS COURT SHOULD NOT RE-EXAMINE THE RIGHT TO PETITION GUARANTEED BY THE FIRST AMENDMENT.

It is true as stated in the Petition, p. 22, that the District Court found as a fact the petitioner was not renominated or reappointed a magistrate because she "protested the additional duties", Petitioner's App. 93, and because of her "speaking out to her supervisor . . . and others", Petitioner's App. 103–104. However, the trial court's decision, Judge Ervin's dissent, and the En Banc decision are based primarily on the constitutional right of *free speech,* not the right to petition the government for a redress of grievances. Judge Ervin clearly recognized the right of petitioner to petition the court. Petitioner's App. 58.

This appeal is not an appropriate vehicle for this Court to re-examine the right to petition guaranteed by the First Amendment. A careful review of Rule 17, Considerations Governing Review on Certiorari, indicates no basis to allow this petition. The petitioner is asking this Court to agree to decide whether the right to petition is absolute. Pet. 25. This is a legal theory new to this case, not briefed or argued below. It is thus inappropriate to be considered here for the first time, since the decision below was based on another constitutional ground.

III.

THE COURT OF APPEALS DID NOT VIOLATE RULE 52(a), *FED. R. CIV. P.*

The Court of Appeals held:

> We hold that the district court erred as a matter of law in finding that Georgia Lewis was not reappointed because she protested matters of public concern rather than matters of her immediate self-interest, within the meaning of the Supreme Court's ruling in *Connick v. Myers,* 461 U.S. 138 (1983).

Petitioner's Appendix, pp. 2–3.

The finding of fact by the trial court in question was:

> [H]e declined to reappoint Ms. Lewis because she had exercised her rights under the First Amendment to the United States Constitution by speaking out, to her supervisor Judge Saunders and to Judge Snepp and others, in opposition to the defendant Blackburn's order regarding microfilm copies of case files.

Petitioner's Appendix, pp. 103–104.

This finding of fact was rejected by the Court of Appeals by adopting the following from Judge Ervin's dissent to the original panel opinion:

> The crux of the matter, then, is whether Lewis's complaints regarding the microfilming assignment could lawfully provide the basis for her non-reappointment.

Petitioner's Appendix, p. 43.

> Here, it is beyond dispute that Lewis's complaints began upon learning that she would be assigned additional duties. The record as I view it is unequivocal that the motivation for her complaints was personal effrontery over being asked to do more work, not public-spirited concern over the administration of justice.

Petitioner's Appendix, pp. 48-49.

See quotes from Petitioner's Appendix, pp. 50, 52-53 and 57 under Argument I above.

Recently this Court had occasion to consider the application of Rule 52(a) with respect to what is meant by "clearly erroneous":

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "*a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

53 USLW 4317 (emphasis added).

It is the contention of the respondents that the whole record fails to support the trial court's conclusion that petitioner was not reappointed a magistrate because she spoke out on matters of *public* concern.

In *Anderson v. City of Bessemer,* ____ U.S. ____, 53 U.S.L.W. 4314 (1985), the District Court's finding was based on "essentially undisputed evidence", p. 4317. Here, the evidence is clearly in dispute as to the motivation for the non-reappointment of petitioner as a magistrate.

> [W]e reaffirm the principle that, in "obscenity" cases as in all other involving rights derived from the First Amendment guarantees of free expression, *this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.*

Jacobellis v. Ohio, 378 U.S. 184, 190 (1963) (emphasis added).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied with all costs assessed against petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

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This the 13th day of September, 1985.

Millard R. Rich, Jr.
Deputy Attorney General